108-132

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 152.

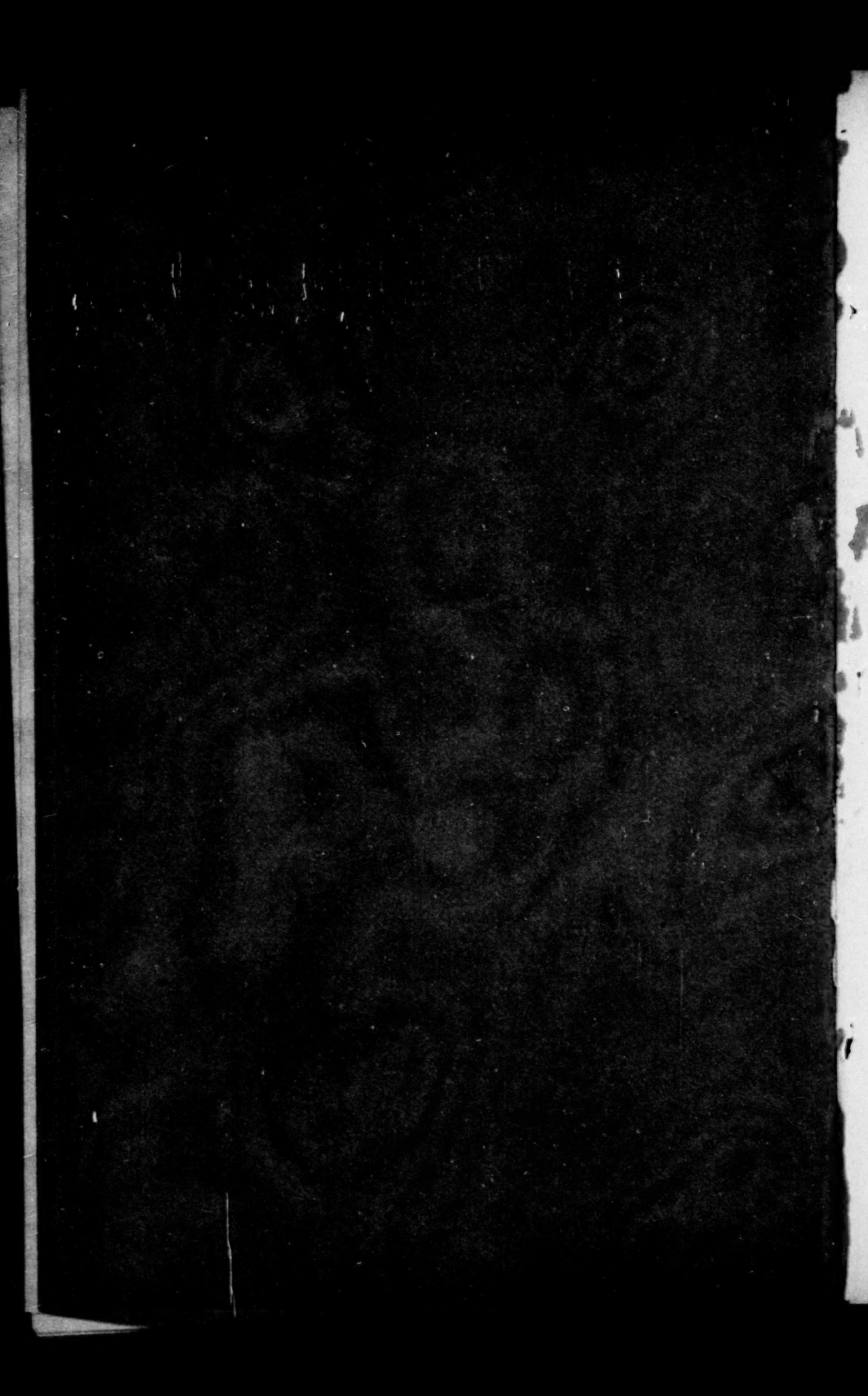
JOHN A. ELLIOTT, APPELLANT,

vs.

GEORGE A. SACKETT AND HUGH T. DICKEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED NOVEMBER 17, 1879.



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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Wednesday, the fourth day of December, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the one hundred and third.

WILLIAM H. BRADLEY, *Clerk.*

JOHN A. ELLIOTT v. GEORGE A. SACKETT AND HUGH T. DICKEY.	In chancery. Original bill.
HUGH T. DICKEY v. JOHN A. ELLIOTT, GEORGE A. SACKETT, Harriet W. Sackett, John De Koven, trustee, John Mattocks, successor in trust, and Benjamin W. Underwood.	Cross-bill.

NORTHERN DISTRICT OF ILLINOIS, *set:*

Be it remembered that on the 29th day of June, A. D. 1877, came the said defendant in the original cause, Hugh T. Dickey, by Messrs.
2 Mattocks and Mason, his solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois at Chicago in the district aforesaid his bond for costs, and a transcript of the record of the proceedings had in the superior court of the county of Cook, in the State of Illinois, in said entitled cause, which said bond and transcript are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the May term, A. D. 1877. In chancery.

JOHN A. ELLIOT
vs.
GEORGE A. SACKETT ET AL.

and

HUGH T. DICKEY
vs.
GEORGE A. SACKETT ET AL.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by me hereby stipulate that execution may issue against my property for any costs taxed against me.

Dated this 29th day of June, A. D. 1877.

EDWARD G. MASON.

3 (Endorsed:) Filed June 29th, A. D. 1877. Wm. H. Bradley, clerk.

4 UNITED STATES OF AMERICA,
State of Illinois, County of Cook, ss:

Pleas before the honorable Samuel M. Moore, one of the judges of the superior court of Cook County, in the State of Illinois, holding a branch court of said court, at a regular term of said superior court of Cook County, begun and holden at the court-house, in the city of Chicago, in said county and State, on the first Monday, being the fourth day, of June, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the one hundred and first.

Present, Honorable Samuel M. Moore, judge of the superior court of Cook County, Luther Laflin Mills, prosecuting attorney, Charles Kern, sheriff of Cook County.

Attest:

JNO. J. HEALY, *Clerk.*

Be it remembered that heretofore, to wit, on the twenty-eighth day of April, in the year of our Lord one thousand eight hundred and
5 seventy-seven, John A. Elliott, by John N. Jewett and William E. Mason, his solicitors, filed in the office of the clerk of superior court of Cook County, his certain bill of complaint, which is in words and figures as follows, to wit:

STATE OF ILLINOIS,
County of Cook:

In the superior court of Cook County. In chancery.

To the honorable the judge of said superior court of Cook County, in chancery sitting:

Your orator, John A. Elliott, who is a resident of the county of Polk and State of Iowa, respectfully represents unto your honor that during the year 1876 he was doing business in the city of Chicago, in the county of Cook, and State of Illinois; that his business consisted mainly in the purchase and sale of real estate; that during the month of February of said year he was solicited to purchase the premises hereinafter described and known a' No. 166 Calumet avenue, by Henry L. Hill, who is a resident of the city of Chicago, county of Cook, and State of Illinois.

6 That said Hill represented himself to be, and as a matter of fact was, the agent of George A. Sackett, who is a resident of the county of Kane and State of Illinois, and whom your orator prays may be made a party defendant to this his bill of complaint.

That on the 18th day of February, A. D. 1876, your orator and said defendant George W. Sackett made and entered into certain "articles of agreement for warranty deed," wherein and whereby said defendant agreed to convey to your orator the following described premises, to wit:

The house and lot known a' No. 166 Calumet avenue, the lot 50 x 127 feet, subject to an incumbrance then on said property of $9,000.00. In consideration of which conveyance your orator agreed to convey to said defendant Sackett lots 8, 9, and 10, block 5, Pitner and Sons' addition to South Evanston, subject to an incumbrance of $1,750, and certain other

property mentioned in said articles of agreement, clear of incumbrance, all of which will more fully appear by a true and correct copy of said articles of agreement which is hereto attached, marked Exhibit A, and which your orator prays may be considered as a part of this his bill of complaint,
7 with the same effect as is fully incorporated and set out herein.

And your orator further represents that during the course of the negotiations said defendants Hill and Sackett desired and solicited your orator to assume the payment of said incumbrance, but your orator refused to assume any liability on account of said incumbrance and insisted that he would not assume or agree to pay said incumbrance, but would simply purchase said property, subject to said incumbrance, and it was thereupon agreed by and between the said parties that neither said defendant Sackett nor your orator should assume or agree to pay the standing incumbrance on the property to be secured by them respectively in the said exchange, which said agreement will more fully appear by said Exhibit A.

Your orator further represents unto your *orator* that in pursuance *to* said contract, and in the excercise of good faith, executed and delivered to said defendant Sackett two deeds, one conveying the property agreed in and by said articles to be conveyed by your orator, free and clear of all
8 incumbrance, and the other of said deeds conveying the property secondly described in this bill of complaint, subject to the said incumbrance of $1,750.00. That both of said deeds from your orator to said defendant Sackett were duly filed for record in the recorder's office of Cook County, State of Illinois, the first of said deeds above mentioned being recorded in book 538 of records at page 456, and the other of said deeds was recorded in book 568 of records at page 310, to which records your orator prays leave to refer, &c.

And your orator further represents unto your honor that said defendant Sackett, disregarding the mutual understanding between the parties aforesaid, and in direct conflict with the written agreement or "Articles of agreement for warranty deed," made or caused to be made and executed his warranty deed to your orator, conveying said premises known as No. 166 Calumet avenue to your orator, reciting in said deed that your orator, the grantee therein named, assumed and agreed to pay said incumbrance and interest as a part of the consideration for said premises, which said recital was contrary to the mutual understanding existing between
9 said Hill and defendant Sackett and your orator, and contrary to the articles of agreement for a warranty deed, hereto attached & marked Exhibit A.

And your orator further represents unto your honor that at the time he received said deed he was suffering under great and painful physical infirmities and mental distress, and did not and could not examine said deed from said Sackett to your orator as minutely and carefully as he should otherwise have done, but passed said deed into the hands of a third person to be filed for record, supposing and believing that said defendant Sackett had acted in good faith with your orator, and made and executed his deed in conformity with the understanding of the parties and the written agreement, Exhibit A.

And your orator attaches to this his bill of complaint a true and correct copy of said deed from said defendant Sackett to your orator, and marked the same Exhibit B, and prays that it may be considered as a part of this bill of complaint.

And your orator further represents unto your honor that not until
10 within *the* short time did he know or become aware of the mistake in said deed; that your orator has, by his attorney, requested said defendant Sackett to correct said mistake, but that he refused so to do, pretending to your orator's solicitor, as your orator is informed and believes, that it was the agreement of your orator to assume and pay said incumbrance, whereas your orator charges the contrary thereof to be the truth, and that as a matter of fact your orator did not assume or agree to pay said incumbrance; and your orator charges that the alteration or variation between the said deed and contract (Exhibit A & B) was made by said defendant either by mistake or with intent to defraud your orator, in either of which events your orator insists the same should be corrected, and prays that the same may be done, all which acting and doings and pretences of the defendant are contrary to equity and good conscience, and tend to the manifest wrong and injury and oppression of your orator in the premises.

In consideration whereof, and inasmuch as your orator is entirely remediless in the premises according to the strict rule of the common
11 law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable, to the end therefore that the said George A. Sackett may full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated, and he thereunto distinctly interrogated, but not under oath, his answer under oath being hereby waived, and that the said deed from the said defendant Sackett to your orator may be reformed by striking therefrom the following words, to wit: "Which debt, with its interest, the said party of the second part assumes and agrees to pay as part of the consideration of this conveyance or purchase-price above stated," and that the recorder of the county of Cook, and State of Illinois, may be authorized by the decree of this honorable court to expunge from the records of said county the said words, as they appear in the record of said deed at page 445 of volume 458 of said records, and that your orator may have such other and further
12 relief in the premises as the nature of this case may require and to your honor shall seem meet.

May it please your honor to grant the writ of summons in chancery, directed to the sheriff of the said county of Kane, commanding him that he summon the defendant George A. Sackett to appear before the said court on the first day of the next term thereof, to be held at the court-house in Chicago, in the county of Cook aforesaid, and then and there to answer this bill, and to stand to, perform, and abide such order and decree therein as to your honor shall seem meet.

JOHN A. ELLIOTT,
By WM. E. MASON,
His Solicitor.

JOHN N. JEWETT,
Of Counsel.

STATE OF ILLINOIS,
Cook County, ss:

John A. Elliott, being duly sworn, on oath states that he is the complainant in the above-entitled cause; that he has heard read the foregoing bill of complaint, and knows the contents thereof, and that the same are true of his own knowledge in substance and in fact, except as to such
13 matters and things as are therein stated and alleged to be true on information and belief, and as to those he believes it to be true.

JOHN A. ELLIOTT.

Subscribed and sworn to before me this 28th day of April, A. D. 1876.
[SEAL.] ELIAS BRAMAN,
Notary Public in and for Cook County, Illinois.

EXHIBIT A.

Articles of agreement made this eighteenth (18th) day of February, in the year of our Lord one thousand eight hundred and seventy-six, between George A. Sackett, of Kane County, Illinois, of the first part, and John A. Elliott, of city of Chicago, Cook Co., Illinois, of the second part, witnesseth:

That if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed, the said party of the first part hereby covenants and agrees to convey and assure to the said party of the second part, in fee simple, clear of all incumbrances, except as stated whatever, by a good and sufficient warranty deed, the following lots, pieces, or parcels of ground, viz:
14 The house and lot known as number 166 Calumet avenue, the lot 50 x 127 feet, and to assign the insurance policy now on said improvements, and to pay the party of 2nd part the sum of fifty dollars.

And the said party of the second part hereby covenants and agrees to pay to the said party of the first part the sum of fifteen thousand dollars, subject to an incumbrance now on said property of ($9,000) nine thousand dollars, in the manner following: Lots 8, 9, and 10, block 5, Pittner & Sons' addition to So. Evanston, being 150 x 200 ft., subject to an incumbrance of $1,750, and interest at 8 % from June, 1875; also lot one (1), block seven (7), Grant's sub. of So. Evanston, and one hundred and twenty acres land, Palo Alto Co., Iowa. The two last-named pieces of property are clear of incumbrances & title to pass by good and sufficient warranty deeds, and to pay all taxes, assessments, or impositions that may be legally levied or imposed upon said lots, except and after the fourth installment of South Park assessment, and in case of failure of said party of the second part to make either of the payments, or perform any of the covenants on his part, this contract shall be forfeited and determined at
15 the election of the said party of the first part; and the party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and liquidation of all damages by him sustained, and he shall have the right to re-enter and take possession.

It is mutually agreed that the time of payment shall be an essential part of this contract, and that all the covenants and agreements herein

contained shall extend to and be obligatory upon the heirs, executors, administrators, and assigns of the respective parties.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year above written.

G. A. SACKETT. [SEAL.]
JNO. A. ELLIOTT. [SEAL.]

Signed, sealed, and delivered in presence of.

EXHIBIT B.

This indenture, made this eighth day of March, in the year of our Lord one thousand eight hundred and seventy-six, between George A. Sackett and Harriet N. Sackett, his wife, of Geneva, Kane County and State of Illinois, the parties of the first part, and John A. Elliott, the party
16 of the second part, witnesseth that the said party of the first part, for and in consideration of the sum of fifteen thousand dollars in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, ha' granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said party of the second part, his heirs and assigns, all the following described lots, pieces, or parcels of land, situated in the city of Chicago, in the county of Cook and State of Illinois, to wit: Lot 15 and part of lot 10, in Gurley's subdivision of blocks twenty-five (25), twenty-eight (28), and thirty-eight (38), in the canal trustees' subdivision of the west half of section twenty-seven (27), town. thirty-nine (39) north, range fourteen (14) east of the third principal meridian, commencing on the west side of Calumet avenue ninety-four and $\frac{53}{100}$ feet north of Twenty-fourth street, running along said avenue north fifty feet; thence west and parallel with Twenty-fourth street one hundred and twenty-six feet; thence south and parallel with Calumet avenue fifty feet; thence east one hundred and twenty-six feet to place of be-
17 ginning. This conveyance is made subject to a trust deed executed by the parties of the first part to John De Koven on the (10th) tenth day of May, 1870, securing the notes of said George A. Sackett to Hugh T. Dickey for nine thousand dollars, due four years from that date, with interest of nine per cent. per annum, interest payable semi-annually; and a further extension of payment, commencing on the tenth day of May, 1874, for same amount above mentioned (nine thousand dollars), payable in five years from said date, with interest of nine per cent., the interest notes payable semi-annually, which debt, with its interest, the said party of the second part assumes and agrees to pay as part of the consideration of this conveyance as purchase price above stated. The covenant hereinafter are subject to the above incumbrance. Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever of the said party of the first part, either tn law or in equity, of, in, and to the above bargained premises, with the hereditaments
18 and appurtenances. To have and to hold the said premises above bargained and described, with the appurteaances, unto the said party of the second part, his heirs and assigns, forever; and the said George A.

Sackett and Harriet N. Sackett, party of the first part, hereby expressly waive, release, and relinquish unto the said party of the second part, his heirs, executors, administrators, and assigns, all right, title, claim, interest, and benefit whatever in and to the above described premises, and each and every part thereof, which is given by all results from all laws of this State pertaining to the exemption of homesteads.

And the said George A. Sackett and Harriet N. Sackett, the party of the first part, for themselves and their heirs, executors, and administrators, do covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivering of these presents they are well seized of the premises above conveyed, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in law and in fee simple, and have good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner
19 and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and encumbrances of what kind or nature soever, and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

In testimony whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

GEORGE A. SACKETT. [SEAL.]
HARRIET N. SACKETT. [SEAL.]

Interlineation on twenty-first line made before signing.

Signed, sealed, a' delivered in presence of.

STATE OF ILLINOIS,
Kane County, ss.

I, Pindar F. Wood, a notary public in and for the said county in the State aforesaid, do hereby certify that George A. Sackett and
20 Harriet N. Sackett, personally known to me as the same person' whose name subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this eighth day of March, A. D. 1876.

[NOTARY SEAL.]

P. F. WOOD,
Notary Public.

Endorsement.

STATE OF ILLINOIS,
Cook County, ss:

No. 75969. I, James Stewart, clerk of the circuit court and ex officio recorder within and for the county and State aforesaid, do hereby certify that the within and foregoing instrument of writing was filed for record

on the 10th day of March, A. D. 1876, at 10 o'clock a. m., and duly recorded in volume 458 of records, on page 445.

In testimony whereof I have hereunto set my hand the day and date aforesaid.

JAMES STEWART,
Recorder.

21 And afterwards, to wit, on the twenty-second day of June, in the year last aforesaid, Hugh T. Dickey, by Mattocks & Mason, his solicitors, filed in the office of said clerk his certain petition and answer, which are in the words and figures following:

Superior court of Cook County.

JOHN A. ELLIOTT
vs. } In chancery.
GEORGE A. SACKETT.

To the honorable judges of said court, in chancery sitting:

Your petitioner, Hugh T. Dickey, respectfully shows unto your honors that he is a citizen of the State of Rhode Island; that he is the legal owner and holder of a certain promissory note for the sum of $9,000 executed by said defendant, George A. Sackett, to the order of your petitioner, which is secured by a certain deed of trust conveying the premises mentioned in the bill of complaint in said cause; the said premises are scant and insufficient security for such indebtedness, which is wholly unpaid;
22 that the interest upon said promissory note is in arrears; that said defendant, Sackett, is insolvent, and that said complainant has become liable under and by virtue of the provisions of the warranty deed in said bill described, and which he seeks in said bill to set aside, to pay to your petitioner said indebtedness, with the interest thereon; that your petitioner is interested in the subject-matter of said suit, and prays that an order may be entered therein requiring said complainant to amend his said bill forthwith by making your petitioner a party defendant thereto, and granting your petitioner leave to file the accompanying answer therein.

HUGH T. DICKEY,
By MATTOCKS & MASON,
His Solicitors.

STATE OF ILLINOIS,
County of Cook, ss:

In the superior court of Cook County. In chancery.

The answer of Hugh T. Dickey, one of the defendants, to the bill of complaint of John A. Elliott.

This defendant, reserving to himself all right of exceptions to the said bill of complaint, for answer thereto saith that he does not know
23 and has not been informed, save by said bill, whether said complainant was solicited to purchase the premises in said bill mentioned or whether said Hill was the agent of said Sackett, or whether said complainant and said Satkett entered into certain articles of agreement for warranty deed as in said bill alleged.

And this defendant, further answering, saith that he is informed and believes it to be untrue that said complainant refused to assume any liability on account of said incumbrance, and insisted that he would not assume or agree to pay said incumbrance, but would simply purchase said property "subject" to said incumbrance, and that it was thereupon arranged by and between the said parties that neither said defendant Sackett nor said complainant should assume or agree to pay the standing incumbrance on the property to be secured by them respectively, as in said bill alleged.

And this defendant, further answering, saith that he does not know, and has not been informed save by said bill, whether said complainant
24 executed and delivered to said defendant Sackett two deeds, as in said bill alleged.

And this defendant, further answering, denies that said defendant Sackett, disregard*ing* the mutual understanding between said parties or conflicted with the articles of agreement between them in the execution and delivery of his warranty deed to said complainant, with the recitals therein, as in said bill alleged, and he denies that the recitals in said deed contained were contrary to the mutual understanding existing between said defendant Sackett and said complainant, or contrary to their articles of agreement, and expressly avers that the recitals in said deed contained did and do truly express the understanding and agreement of the parties thereto, and that said complainant is bound and concluded thereby, and that said complainant is estopped from denying or contradicting the same.

And this defendant, further answering, says that he is informed and believes that it is not true that said complainant was at the time he received said deed unable to examine said deed minutely and carefully, or
25 that he did not do so; and he avers that said complainant was at that time, and ever since had been, well aware of the contents and meaning of said deed and of the obligation thereby imposed upon him, which he has since repeatedly recognized and acknowledged, and he denies that any mistake whatever was made in said deed, or that said complainant is entitled to any of the relief in said bill prayed; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct; and he prays that said bill may be dismissed at the cost of said complainant.

HUGH T. DICKEY,
By MATTOCKS & MASON,
His Solicitors.

MATTOCKS & MASON,
Complainant's Solicitors.
E. G. MASON,
Of Counsel.

And thereupon, on the day and year last aforesaid, the same being one of the days of the June term of said court, the following among other proceedings were had in said court, and entered of record, to wit:

26 JOHN A. ELLIOTT)
vs.) 67001.
GEORGE A. SACKETT.)

This day comes the complainant in this suit, by William E. Mason, his solicitor, and thereupon, on motion of Hugh T. Dickey, by Mattocks & Mason, his solicitors, and upon his petition this day filed in said cause, it

is ordered by the court that said complainant amend the bill of complaint in said cause forthwith, by making said Hugh T. Dickey a party defendant thereto, and that said Hugh T. Dickey have leave to file his answer to said bill, which being done, on motion of said Hugh T. Dickey, by his solicitors aforesaid, leave is given him to file his cross-bill in said cause by the first Monday of July, next, and said complainant is ruled to file his answer thereto within ten days after the filing of said cross-bill.

And afterwards, to wit, on the 28th day of June, in the year aforesaid, the said defendant, Hugh T. Dickey, filed in said clerk's office his petition & bond for the removal of this cause to the U. S. circuit c't in and
27 for the northern district of Illinois, which said bond & petition are in words and figures following, to wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the superior court of Cook County. In chancery. June term, 1877.

JOHN A. ELLIOTT, COMPLAINANT,
vs.
GEORGE A. SACKETT, HUGH T. DICKEY, DEFENDANTS.

Petition for removal to the circuit c't of the U. S. for the nor. dist. of Ill's.

To the honorable judges of said court, in chancery sitting:

Your petitioner, Hugh T. Dickey, respectfully shows to this honoroble court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different
28 States, and the petitioner was, at the time of the commencement of this suit and still is a citizen of the State of Rhode Island; and that said John A. Elliott was then and still is a citizen of the State of Iowa, and that said George A. Lackett was then and still is a citizen of the State of Illinois.

That in the said suit there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit, a controversy between the said complainant and your petitioner and said George A. Sackett.

And your petitioner offers herewith a bond, with good and sufficient surety for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond and to cause the record herein to be removed into
29 said circuit court of the United States in and for the northern district of Illinois; and he will ever pray.

HUGH T. DICKEY,
By MATTOCKS & MASON,
His Solicitors.

STATE OF ILLINOIS,
County of Cook, ss:

I, Edward G. Mason, being duly sworn, do say that I am a member of the firm of Mattocks & Mason, the attorneys for the petitioner in the above entitled cause; that I have read the foregoing petition, and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

EDWARD G. MASON.

Subscribed by the said Edward G. Mason in my presence, and by him sworn to before me this 22d day of June, A. D. 1877.

[SEAL.] CHARLES O. HENTHORN,
Notary Public.

Know all men by these presents that we, Hugh T. Dickey as principal and John De Koven as surety, are held and firmly bound unto
30 John A. Elliott in the penal sum of five hundred dollars ($500), the payment whereof, well and truly to be made unto the said John A. Elliott, his heirs and assigns, we bind ourselves, our heirs, representatives, and as'igns, jointly and severally, firmly by these presents, yet, upon these conditions, the said Hugh T. Dickey having petitioned the superior court of Cook County, State of Illinois, for the removal of a certain cause therein pending, wherein John A. Elliott is complainant and George A. Sackett and Hugh T. Dickey are defendants, to the circuit court of the United States in and for the northern district of Illinois:

Now, if the said Hugh T. Dickey shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this twenty-second day of June, A. D. 1877.

31 HUGH T. DICKEY, [SEAL.]
By JOHN DE KOVEN, [SEAL.]
His Att'y in Fact.
JOHN DE KOVEN. [SEAL.]

Approved.

S. M. MOORE.

STATE OF ILLINOIS,
Cook County, ss:

I, John De Koven, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Illinois and a property holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution; that I have property in the State of Illinois liable to execution of the value of more than five hundred dollars.

JOHN DE KOVEN.

Subscribed in my presence by John De Koven, and by him sworn to before me this 22nd day of June, A. D. 1877.

[SEAL.] JAS. M. BOWMAN,
Notary Public.

32 *Bill.*

JOHN A. ELLIOTT
vs.
GEORGE A. SACKETT, HUGH T. DICKEY. } 2410. 67001.

This day again comes the defendant Hugh T. Dickey, by his solicitor aforesaid, and files herein his petition for the removal of this cause to the United States circuit court in and for the northern district of the State of Illinois, and it appearing to the court that said defendant has filed herein his bond conditioned according to the act of Congress in such case made and provided, it is ordered by the court that this cause be, and the same is hereby, transferred to the said U. S. circuit court, and that the clerk of this court do forthwith transmit to said U. S. circuit court a complete transcript of all papers and pleadings filed in this cause, together with all orders of court made and entered of record herein.

STATE OF ILLINOIS,
Cook County, ss.:

33 I, John J. Healy, clerk of the superior court of Cook County, within and for the State of Illinois, do hereby certify that the above and foregoing is a full, true, and complete transcript of all papers and pleadings now on file in my office, and of all orders made and entered of record in said court in a certain cause lately pending in said court on the chancery side thereof, wherein John A. Elliott was complainant and George A. Sackett et al. defendants.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this 28' day of June, A. D. 1877.

SEAL OF SUPERIOR COURT OF COOK COUNTY, ILLINOIS. JOHN J. HEALY, *Clerk.*

(Endorsed:) Filed June 29, '77. Wm. H. Bradley, cl'k.

34 On the same day, to wit, the 29th day of June, A. D. 1877, the said defendant, Hugh T. Dickey, by his solicitors, filed in said clerk's office his cross-bill in said entitled cause, which said cross-bill is in the words and figures following, to wit:

Cross-bill of Hugh T. Dickey.

Circuit court of the United States, northern district of Illinois, July term, 1876. In chancery.

JOHN A. ELLIOT, COMPLAINANT,
vs.
GEORGE A. SACKETT AND HUGH T. DICKEY, defendants. } Bill.

HUGH T. DICKEY, COMPLAINANT,
vs.
GEORGE A. SACKETT, HARRIETT W. SACKETT, John De Koven, trustee, John Mattocks, successor in trust, Benjamin W. Underwood, and John A. Elliot, defendants. } Cross-bill.

To the judges of the circuit court of the United States, in chancery sitting:

Your orator, Hugh T. Dickey, of Newport, Rhode Island, and
35 a citizen of the State of Rhode Island, brings this his cross-bill against George A. Sackett and Harriet W. Sackett, of Geneva, Illinois, and John De Koven, trustee, John Mattocks, successor in trust, and Benjamin W. Underwood, of Chicago, Illinois, residents of said district, and citizens of the State of Illinois, and John A. Elliot, of Des Moines, Iowa, and a citizen of the State of Iowa; and thereupon your orator complains and says that on the twenty-eighth day of April, A. D. 1877, the said John A. Elliot, one of the defendants herein named, exhibited in the superior court of Cook County, from which court this cause has been duly removed to this court, his bill of complaint against George A. Sackett, one of the defendants herein named, to which bill your orator was afterwards also made a party defendant, praying that a certain deed of conveyance of the premises hereinafter described, wherein and whereby said Elliott assumed and agreed to pay the indebtedness hereinafter set forth, as a part of the consideration of said deed of conveyance, may be reformed by striking out the provisions by which said Elliot so assumed such payment, and for other relief; and your orator duly appeared and put in his answer thereto, as by the copy of the record in this cause now remaining on file in this court, reference thereto being had, will more fully appear.

And your orator further says that on or about the twelfth day
36 of May, 1870, at the city of Chicago, in said district, the said defendant George A. Sackett became and was indebted to your orator in the sum of nine thousand dollars ($9,000), for money sborrowed by him of your orator, and being so indebted, in consideration thereof, the said George A. Sackett then executed his certain promissory note for the said sum of nine thousand dollars, bearing date the twelfth day of May, 1870, payable to the order of your orator, at his office in said city of Chicago, in three years after the date thereof, the interest on said note, until maturity thereof, at the rate of nine per cent. per annum, being secured to be paid semi-annually by six certain interest notes given therewith, each for the sum of four hundred and five dollars ($405), and due respectively November twelfth, A. D. 1870, May twelfth, A. D. 1871, November twelfth, A. D. 1871, May twelfth, A. D. 1872, November twelfth, A. D. 1872, and May twelfth, A. D. 1873.

And your orator further says that the said George A. Sackett and the said Harriet W. Sackett, his wife, on the twelfth day of May, A. D. 1870, to secure the payment of the principal and interest of said note, made and executed under their hands and seals and delivered to your orator a certain trust deed, in and by which said trust deed the said George A. Sackett
37 and Harriet W. Sackett as party of the first part, did convey to said John De Koven, trustee, as party of the second part, all the premises situate in the county of Cook and State of Illinois known and described as lot number fifteen (15) and part of lot number ten (10) in Gurley's subdivision of blocks number twenty-five (25), twenty-eight (28), and thirty-eigth (38), in the canal trustees' subdivision of the west half of section number twenty-seven (27), township thirty-nine (39) north, range fourteen (14) east of the third (3rd) principal meridian, bounded as follows, to wit: Commencing on the west side of Calumet avenue, ninety-four and fifty-three hundredths ($94\frac{53}{100}$) feet north of Twenty-fourth street, run-

ning thence along said avenue north fifty (50) feet; thence west and parallel with Twenty-fourth street one hundred and twenty-six (126) feet; thence south parallel with Calumet avenue fifty (50) feet; thence east one hundred and twenty-six (126) feet, to the place of beginning, with all and singular the privileges and appurtenances thereunto belonging, which said trust deed was conditioned for the payment of the said sum of nine thousand dollars and interest thereon, according to the terms of said note and said interest notes; and was duly acknowledged and filed for record in the recorder's office of Cook County, Illinois, on the twenty-third day
38 of May, A. D. 1870, and recorded in book 593, page 27, as document number 53577.

And your orator further says that in said trust deed it was agreed that in case of default in any of the payments of principal or interest on said promissory note, then, and in that case, the whole principal sum secured by said trust deed, and the interest thereon, according to the tenor and effect of said promissory note to the time of sale, should, at the option of the legal holder or holders of said promissory note, become at once due and payable, all of which by said trust-deed and certificates of acknowledgment and recording endorsed thereon and ready to be produced in court, to which, for greater certainty, your orator prays leave to refer, will more fully and at large appear.

And your orator further says that said note and said trust-deed have ever since been, and are now, held and owned by your orator; that said defendant George A. Sackett continued to pay said interest notes as they matured up to the maturity of said promissory note, which said note, by the terms thereof, matured on the twelfth day of May, A. D. 1873; that on said last-mentioned day said defendant Sacket and your orator agreed together that said note should be extended for five years from said last-mentioned day, with interest at the rate of nine per cent. per an-
39 num, for which ten interest notes were made and delivered by said Sackett to your orator, each for the sum of four hundred and five dollars, such extension being made subject to all the terms and provisions of said trust-deed, so far as the same should be applicable, and upon the express understanding and agreement that in case of default in the payment of any of said last-mentioned interest notes, then the whole of the principal of said promissory note and the interest thereon to the time should, at the option of the holder thereof, become at once due and payable, and that said premises might be sold as provided in said trust-deed.

And your orator further says that on the twelfth day of May, A. D. 1877, one of said last-mentioned interest notes matured, and has ever since remained, and is now, overdue and unpaid to your orator, who is the legal owner and holder thereof, for which default your orator, as he might lawfully do in such case, has exercised his option and declared the whole of said principal sum of nine thousand dollars to be, and the same thereby has become, due and payable to your orator, with interest, according to the tenor, effect, and meaning of said note and trust-deed, to wit, at the district aforesaid.

And your orator further says that by reason of the premises the said George A. Sackett, defendant aforesaid, has become indebted to
40 and now justly owes to, your orator upon security of said note and trust-deed the whole of said principal sum of nine thousand dollars,

with interest thereon at the rate of nine per cent. per annum, payable semi-annually, from the twelfth day of November, A. D. 1876, with interest on said interest payments after due at the rate of ten per cent. per annum to the present time, and that no proceedings have been had to recover the debt secured by said note and trust-deed, or of any part thereof.

And your orator further says that, subsequent to the execution and delivery and recording of said trust deed, the said George A. Sackett and Harriet W. Sackett by their certain warranty deed, bearing date on the eighth day of March, A. D. 1876, did convey to said defendant John A. Elliot the lands and premises described in said trust-deed, which said warranty deed was duly executed and acknowledged and delivered by said George A. Sackett and Harriet W. Sackett to the said John A. Elliot, for the consideration therein expressed of fifteen thousand dollars, and which said warranty deed was on the tenth day of March, A. D. 1876, by the said John A. Elliot, duly filed for record in the office of the recorder of Cook County, Illinois, and was duly recorded in book No. 458 of records at page 445, as by said deed and said records, to which reference is hereby made, will more fully and at large appear; and your orator
41 further says that as part of the said consideration of fifteen thousand dollars of said warranty deed said John A. Elliot did assume and agree to pay the debt secured by said trust-deed, with its interest as aforesaid, and a clause to that effect was contained in said warranty deed, by means whereof said defendant John Elliot became liable to pay unto your orator the said principal sum of nine thousand dollars, together with the interest thereon as aforesaid, and that your orator by virtue of said agreement is entitled to recover of said defendant John A. Elliot said principal sum and interest in addition to any right of recovery he may have against the said George A. Sackett, as aforesaid.

And your orator further says that said John A. Elliot has not paid said principal sum or any part thereof or any interest thereon since the twelfth day of November, A. D. 1876, and that the said George A. Sackett is now insolvent and unable to pay or satisfy any decree that may be rendered against him for any balance of money that may be found due and owing to your orator over and above the proceeds of the sale for which your orator herein prays, and that the premises embraced in the said trust-deed are scant and insufficient security for the amount of the said debt and interest, and cannot be sold for enough to pay the same, and that with-
42 out a judgment or decree of this court against said defendant John A. Elliot, after such sale has been made your orator would be unable to realize the amount of said debt and interest, on account of the insolvency of said defendant George A. Sackett.

And your orator further says, that in and by said trust deed it was provided that in case of default in the payment of the said note, or the interest theron, or any part thereof, then on the application of the legal holder of said note, it should and might be lawful for the said John De Koven, trustee, to sell said premises in the manner and for the purposes in said trust deed expressed, and that in case of the death, resignation, removal from the city of Chicago, or other inability, to act of said John De Koven, trustee, then said said John Mattocks was thereby appointed and made the successor in trust therein with like power and authority.

And your orator further says, that he has applied to the said John

De Koven, as trustee, to sell said premises according to the provisions of said trust deed, but said John De Koven refuses so to do, and resigns said trusteeship, and is unable to act as such trustee, and thereupon your orator applied to said John Mattocks as successor in trust to sell said premises according to the provisions of said trust deed, but said John Mattocks refuses so to do, and resigns such successorship and is unable to act as such trustee or successor in trust.

43 And your orator further shows that he has an equitable lien upon the rents, issues and profits of said premises which amount to the sum of six hundred dollars, per annum; and that said John A. Elliot is in possession thereof by his tenant said Benjamin W. Underwood, whom your orator makes a party defendant hereto.

And seeing that your orator has no adequate remedy by the course of the common law, and can only have relief in a court of equity where such matters are properly cognizable, your orator prays the issuance herein of a writ of subpœna in chancery to said defendants, George A. Sackett, Harriet W. Sackett, John De Koven, trustee, John Mattocks, successor in trust, Benjamin W. Underwood, and John A. Elliott directed, requiring them and each of them, to be and appear herein, and make answer to all the material parts of this your orator's cross-bill, on a day certain to be therein named according to the rules and practice of this court, but not under oath, (answer under oath being hereby expressly waived); and that your honors cause to be taken a just accounnt of all the aforesaid moneys and interest due your orator upon said note and trust deed upon the premises therein described, and order and decree the same to be sold and conveyed according to the rules and practice of this court in case said defendants or some or one of them do not

44 by a certain day to be named in such decree, pay to your orator the amount so to be found due to your orator with interest and the costs of this proceeding; that your honors will, in such decree provide for the barring and foreclosing of all rights or equity of redemption or otherwise of said defendants and all persons claiming under them or any of them subsequent to the commencement of this suit in case of such sale, and also for the payment out of the proceeds of such sale of the aforesaid indebtedness, interest, and costs to your orator, and that a decree may be rendered against said defendant George A. Sackett, and also against said defendant John A. Elliot, for any balance of money that may be found due and owing to your orator over and above the proceeds of such sale; and that execution may issue for the collection of such balance, in pursuance of the statute in such case made and provided, and that in the mean time some proper person may be appointed by this court to receive and collect the rents, issues, and profits of said premises, and to take charge of and manage said premises with all of the appurtenances thereof, and that said defendant John A. Elliot be, by the order of this court, restrained from further collecting any rents from the tenant of said premises, and that said defendant Benjamin W. Underwood be

45 by such order restrained from paying any rents or moneys on account of the use of said premises to the said John A. Elliot or any other person except the receiver herein appointed, and that your orator may

have the above and such other and further relief as unto your honors may seem meet, &c.

And your orator will ever pray, &c.

HUGH T. DICKEY,
By JOHN DE KOVEN,
His Att'y in Fact.

MATTOCKS AND MASON,
Complainant's Sol'rs.
E. G. MASON,
Of Counsel.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

John De Koven being duly sworn, deposes and says that he is the duly authorized agent of Hugh T. Dickey, the complainant named in the foregoing bill, and that he has read the above bill and knows the contents thereof, and the same is true, except as to those matters stated on information and belief, and as to those he believes it to be true.

JOHN DE KOVEN.

Subscribed and sworn to before me this 29th day of June, A. D. 1877.
[SEAL.] JOS. M. BOWMAR,
Notary Public.

(Endorsed:) Filed June 29, 1877. Wm. H. Bradley, cl'k.

46 And on the same day, to wit, the 29th day of June, A. D. 1877, in the record of the proceedings of said court, in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOHN A. ELLIOT
v.
GEORGE A. SACKETT, ET AL. } In chancery.

Now come the parties by their solicitors, and now comes on to be heard the motion of the complainant for the appointment of a receiver herein, and after hearing the same, the court being sufficiently advised in the premises, overruled said motion.

Afterwards, to wit, on the 30th day of June, A. D. 1877, said defendant, George A. Sackett, by his solicitor, filed in said clerk's office, his answer in said entitled cause, which said answer is in the words and figures following, to wit:

Answer of George A. Sackett.

UNITED STATES OF AMERICA,
Northern District of Illinois ss:

In the circuit court of said northern district, June term, 1877.

GEORGE A. SACKETT
ats.
JOHN A. ELLIOTT.

Cause removed from superior court of Cook county, in said State of Illinois.

47 The answer of George A. Sackett, defendant to the bill of complaint of John A Elliott, complainant.

This denfendant now, and at all times hereafter, saving and reserving unto himself, all benefits and advantage of exception, which can, or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, answering, says:

This defendant admits that during the year 1876, the said Elliott, complainant, was doing business in the city of Chicago, and State of Illinois, and that said Elliott's business consisted mainly of the purchase and sale of real estate; that the complainant may have been solicited to purchase premises known as 166 Calumet avenue, then owned by this defendant, through the agency of Henry L. Hill.

This defendant does not know, and therefore neither admits nor denies whether said Hill represented himself to be the agent of this defendant, but admits that this defendant authorized Henry L. Hill to act as agent for defendant in the sale and disposal of said premises, the said Hill being fully informed of the facts in relation to the said premises and the title thereto, and that there existed as against said premises an incumbrance of nine thousand dollars, bearing semi-annual interest; that

48 because of his advanced age and retirement from business, this defendant desired to be released from all liability to pay said indebtedness, and of defendants' desire and peremptory request that the purchaser should especially covenant to assume and pay the said incumbrance. Further, defendant admits that he entered into an agreement in writing to convey said premises in a certain manner and on certain conditions, but the exact words and terms of said agreement the defendant does not remember, and defendant calls on the complainant to make the same to fully appear to the court.

This defendant, further answering, says that he admits that said defendant at the time of the negotiations with the said Elliot for the sale of said premises, this defendant did solicit the said complainant to assume and agree to pay said incumbrance of nine thousand dollars, and interest thereon. And this respondent denies that the said complainant refused the said solicitations and request of this defendant, but this respondent avers and will, at the proper time and place, prove the truth to be that when the negotiations, conversations, and details preliminary to the final completion of the transactions upon which this suit was brought were ended and the parties were ready to close the transaction by the delivery of the deeds, it was fully and fairly understood by the parties to the same

49 that a warranty deed conveying the said premises, 166 Calumet avenue, should and would be accepted by the said Elliott with the condition of conveyance herein provided, viz, that the said Elliott did assume and agree to pay as a covenant of said deed the before mentioned nine thousand dollars, and interest semi-annually, and the warranty deed of this defendant contained that provision accordingly. This defendant solemnly and upon his oath denies all deceit, fraud, or misrepresention in the premises wherewithal he is so maliciously and unjustly charged in said bill, and says that at the time of said transaction said incumbrance was considered to be and was a part of the purchase price thereof, and the same

was so set forth in the said warranty deed of said defendant, and was likewise so considered and distinctly understood by this defendant, and as defendant verily believes and so charges the truth to be was so understood by the complainants at the time.

This defendant further says that at the time of said transaction this defendant and others who were considered competent to estimate the value of said property estimated the same to be worth at least fifteen thousand dollars, and the moving influence to induce this defendant to make the said enchange was that this defendant might lay down the burden
50 of so large a debt and to do so suffered what he and others at the time considered a very large sacrifice in the value of the said property.

Respondent further says that the said Elliott deliberately and carefully read over said deed in the office of said Henry L. Hill, at the time of the delivery of the papers in said transaction, in the presence of this defendant, being fully aware of and noting especially, as this defendant believes from his best recollection, the said clause in said deed, which complainant now desires shall be expunged, changed, or avoided.

This respondent is informed and believes that since the time of said transaction there has been very great changes in the market value of real estate, being a decline from one fourth to one-third, leaving property-holders greatly embarrassed and oppressed, particularly where large incumbrances are to be cared for and paid.

This respondent verily believes, and so charges the truth to be, that the bias of self interest has constrained said Elliott to test his ability to maintain his said suit, so unjustly begun against this defendant, who has vainly hoped, as it now appears, to be released from all concern as to the said incumbrance and interest thereon.

51 This respondent denies that there was any understanding at the time of the delivery of said warranty deed to said Elliott, different from the covenants in said deed mentioned.

This defendant does not know, and therefore cannot state, whether or not the said complainant was, at the time of said transaction, suffering under physical infirmities and mental distress.

This defendant denies that the said complainant did not understand and so accept said deed of said premises, and that he did not assume and agree to pay said incumbrance, and for proof of the truth of this denial, defendant prays the court to examine a certified copy of said deed, to the said bill attached and marked Exhibit B, which, if correct and duly authenticated, this defendant prays may be made a part of this answer, by which it will fully appear that said incumbrance was assumed and agreed to be paid as a part of the consideration for said conveyance, and the agreement to pay said incumbrance a condition precedent to conveyance of title to said Elliott.

And further answering respondent says that at such a great length of time it ill becomes said Elliott to ask the court to amend the said deed in such a manner as to make this defendant liable, when, for said whole period since the said transaction, the said Elliott has had full benefit
52 of the rents, issues, and profits arising from said (house) premises, amounting to several hundreds of dollars, and has also, as this defendant believes upon information, neglected to pay the interest on said

incumbrance, has also failed to pay the taxes on the same, as defendant is informed and believes.

And defendant submits whether he, the said Elliott, ought not to do equity before he can ask the court for any relief in the matter wherein he has so failed to perform equity.

This respondent now having fully and particularly answered or admitted all of the averments in said bill material to the issues herein, prays the court that he may be hence dismissed with his costs and charges so most wrongfully sustained and borne.

GEORGE A. SACKETT.

STATE OF ILLINOIS,
Kane County, ss:

On this 28th day of June, 1877, before me personally appeared George A. Sackett, and made oath that he has read the above answer subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to matters which are therein stated to be on his information and belief, and as to those matters he believes them to be true.

53 Witness my hand and notarial seal at Geneva, Kane County, State of Illinois, this twenty-eighth day of June, A. D. 1877.

[SEAL.] PINDAR F. WARD,
Notary Public in and for the said County, in the State aforesaid.

(Endorsed:) Filed June 30, 1877. Wm. H. Bradley, cl'k.

54 Afterwards, to wit, on the 7th day of December, A. D. 1877, in the record of the proceedings of said court in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

JOHN A. ELLIOTT
vs.
GEORGE A. SACKETT ET AL. } In chancery. Original bill.

and

HUGH T. DICKEY
vs.
GEORGE A. SACKETT ET AL. } Cross-bill.

And now, on this day, said cause coming on to be heard, on the motion of the complainant in said cross-bill for the appointment of a receiver according to the prayer of said cross-bill, the court being fully advised in the premises, doth order and decree that James Gamble be, and hereby is, appointed receiver of the premises described in said cross-bill, otherwise known as number 166 Calumet avenue, upon giving bond in the sum of fifteen hundred dollars, with John De Koven as surety, with full power and authority to receive and collect the rents and profits of said premises accruing from and after December first, A. D. 1877, and to take charge

of and manage the same, and that said defendant, John A. Elliott, is hereby restrained from collecting any rents from any person or persons in possession of said premises; and said defendant Benjamin W.
55 Underwood is hereby restrained from paying any rent on account of the use of said premises from and after December first, A. D. 1877, to any other person than said James Gamble, as such receiver, to whom said Underwood is hereby directed to pay the same from and after December first, A. D. 1877.

And it is further ordered that said James Gamble keep a full and correct account of all his acts and doings as such receiver, and report the same to this court from time to time.

Afterwards, to wit, on the 5th day of March, A. D. 1878, said defendant in the cross-bill, John A. Elliott, filed in said clerk's office his answer to the cross-bill of Hugh T. Dickey in said entitled cause, which said answer is in the words and figures following, to wit:

Answer of John A. Elliott to cross-bill of Hugh T. Dickey.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States, northern district of Illinois, in chancery.

JOHN A. ELLIOTT
v.
GEORGE A. SACKETT ET AL. } Bill.

HUGH T. DICKEY
vs.
GEORGE A. SACKETT, JOHN A. ELLIOTT, ET AL. } Cross-bill.

56 The separate answer of John A. Elliott to the said cross-bill of Hugh T. Dickey, complainant therein.

This defendant, now and at all times hereafter, saving and reserving to himself all manner of benefit of exception to the many errors, uncertainties, and insufficiencies in said complainant's cross-bill of complaint contained, for answer thereto, or to so much and such parts thereof as this defendant is advised is material or necessary for him to make answer unto, answering says:

That he admits upon information and belief the execution of the notes and trust-deed in said cross-bill mentioned and described, and also admits, upon information and belief, that the said trust-deed was secured upon the premises described in the original and cross-bill herein, but this defendant has no knowledge or information as to how much, if anything, there is now due from his codefendant, George A. Sackett, to the said complainant in said cross-bill by reason or on account of the indebtedness mentioned and described in said cross-bill.

And this defendant, further answering, says that he admits that he is interested in the said premises, and that said interest is as follows:

That on, to wit, the 18th day of February, A. D. 1876, this de-
57 fendant made and entered into a contract for a warranty deed with the said George A. Sackett, a copy of which is set out in this defendant's original bill of complaint herein, which said contract was carried out in good faith on the part of this defendant, but that said defendant George A. Sackett so drafted, or caused to be drafted, the deed of conveyance from him to this defendant that said deed recited that this defendant assumed and agreed to pay the encumbrance in said cross-bill described.

And this defendant, further answering, states and charges the fact to be that the recitation in said deed that this defendant assumed and agreed to pay said encumbrance was so inserted either by mistake or fraud on the part of said Sackett or his agent. That said recitation of assumption was untrue; that, as a matter of fact, this defendant never did, either verbally or in writing, agree to assume said encumbrance, but, on the contrary thereof, always refused and declined so to do. That, as a matter of fact, this defendant did not know that the said deed of conveyance from the said defendant Sackett to this defendant contained any such recitation of assumption until a long time after said deed had been filed for record in the recorder's office of Cook County. That, as a matter of fact, this defendant,

at the time said deed from Sackett was presented to him, was
58 suffering under great physical infirmities and mental distress, and did not and could not examine said deed from said Sackett to this defendant as minutely and carefully as he otherwise should have done, but passed said deed into the hands of a third party to be filed for record, supposing and believing that said defendant Sackett had acted in good faith with this defendant and made said deed in conformity with the understanding between the parties.

And this defendant, further answering, says that he denies that said complainant, in said cross-bill named, has, in equity, any right to the entering of a deficiency decree against this defendant in his said cross-bill.

And this defendant, having fully answered said cross-bill, prays to be hence dismissed with his costs.

JOHN A. ELLIOTT,
By WM. E. MASON,
His Sol'r.

JNO. N. JEWETT, *of Counsel:*

(Endorsed:) Filed M'ch 5, '78. Wm. H. Bradley, cl'k.

And on the same day, to wit, the fifth day of March, A. D. 1878, said Hugh T. Dickey, by his solicitors, filed in said clerk's office his replication to the answer of said John A. Elliott to his cross-bill in said en-
59 titled cause, which said replication is in the words and figures following, to wit:

Replication of Hugh T. Dickey to answer of John A. Elliott to cross-bill.

STATE OF ILLINOIS,
Cook County, ss:

In the U. S. circuit court of nor. dist. of Ills., March term A. D. 1878, in chancery.

JOHN A. ELLIOTT
v.
GEORGE A. SACKETT ET AL. } Bill.

HUGH T. DICKEY
v.
GEORGE A. SACKETT ET AL. } Cross-bill.

The replication of Hugh T. Dickey, complainant in cross-bill, to the separate answer of John A. Elliott to the said cross-bill.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendant, for replication thereunto says that he will aver, maintain, and prove his cross-bill of complaint to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant Elliott is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true, all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his cross-bill aforesaid he has already prayed.

MATTOCKS AND MASON,
Solicitors for Complainant in Cross-bill.

(Endorsed:) Filed March fifth, 1878. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 6th day of May, A. D. 1878, said John De Koven, trustee, John Mattocks, successor in trust, and Benjamin W. Underwood, by their solicitor, filed in said clerk's office their appearance in said entitled cause, which said appearance is in the words and figures following, to wit:

Appearance of John De Koven, trustee, John Mattocks, successor in trust, and Benjamin W. Underwood.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States for the northern district of Illinois.
March term A. D. 1878.

JOHN A. ELLIOTT
v.
GEORGE A. SACKETT AND HUGH T. DICKEY.

61 and

HUGH T. DICKEY
vs.
JOHN A. ELLIOTT, GEORGE A. SACKETT, ET AL. } In chancery.

I do hereby enter the appearance of John De Koven, trustee, John Mattocks, successor in trust, and Benjamin W. Underwood to the cross-bill filed in said cause, and consent to their immediate default as three of the defendants to the cross-bill in the above-entitled cause under the authority hereto annexed.

ROBERT A. CHILDS,
Solicitor for said Defendants to said Cross-bill.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, March term, A. D. 1878. In chancery.

JOHN A. ELLIOTT
v.
GEORGE A. SACKETT AND HUGH T. DICKEY. } Bill.

and

HUGH T. DICKEY
vs.
JOHN A. ELLIOTT, GEO. A. SACKETT, HARRIET W. Sackett, et al. } Cross-bill.

We do hereby authorise Robert A. Childs, or any attorney or solicitor of any court of record, to enter our appearance in the above-
62 entitled cause to the cross-bill filed therein and consent to our immediate default without cost or charge to us for attorneys' or solicitors' fees.

JOHN DE KOVEN, *Trustee.* [SEAL.]
JOHN MATTOCKS, [SEAL.]
Successor in Trust.
BENJAMIN W. UNDERWOOD. [SEAL.]

(Endorsed:) Filed May 6, 1878. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 8th day of May, A. D. 1878, said complainant, by his solicitor, filed in said clerk's office his replication to the answer of George A. Sackett in said entitled cause, which said replication is in the words and figures following, to wit:

Replication to answer of George A. Sackett.

STATE OF ILLINOIS,
Cook County, ss:

In the U. S. circuit court of nor. dist. of Ill's. March term, A. D. 1878.

JOHN A. ELLIOTT
v.
GEORGE A. SACKETT ET AL. } In chancery.

The replication of John A. Elliott, complainant, to the answer of George A. Sackett.

This repliant, saving and reserving to himself, now and at all
63 times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendant, for replication thereunto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, and avoided, traversed or denied, is true. All which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

WM. E. MASON,
Solicitor for Complainant Elliott.

(Endorsed:) Filed this 8th day of May, A. D. 1878, Wm. H. Bradley, clerk.

Afterwards, to wit, on the 16th day of May, A. D. 1878, a writ of subpœna issued out of said clerk's office to said defendants in said cross-bill, which said writ, with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Writ of subpœna.

64 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to George A. Sackett and Harriet W. Sackett, impleaded with John De Koven, trustee, et al., greeting:

We command you and every of you that you appear before our judges

of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of July next, to answer the cross-bill of complaint of Hugh T. Dickey, complainant in cross-bill filed in the case of John A. Elliot against George A. Sackett et al., heretofore filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 16th day of May, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 102nd.

[SEAL.] WM. H. BRADLEY, *Clerk.*

65 MEMORANDUM.—The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

I have served the within writ within my district in the following manner, to wit: Upon George A. Sackett, therein named, on the 1st day of June, A. D. 1878; also upon Harriet W. Sackett, therein named, on the 1st day of June, A. D. 1878, by personally delivering to each of them a true copy of the same on the aforesaid day.

JESSE S. HILDRUP,
U. S. Marshal,
By L. O. GILMAN, *Deputy.*

(Indorsed:) Filed June 14, A. D. 1878. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 3rd day of July, A. D. 1878, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

66 JOHN A. ELLIOT *v.* GEORGE A. SACKETT AND HUGH T. DICKEY.	In chancery. Original bill.
and	
HUGH T. DICKEY *v.* GEORGE A. SACKETT, HARRIET W. SACKETT, John A. Elliot, John De Koven trustee, John Mattocks, successor in trust, and Benjamin W. Underwood.	Cross-bill.

On this day comes said complainant in said cross-bill, by his solicitors, Mattocks and Mason, and moves the court that said defendants, George

A. Sackett, Harriet W. Sackett, John De Koven, trustee, John Mattocks, successor in trust, and Benjamin W. Underwood, be severally called to appear and make answer to the cross-bill herein, and that in default thereof their several defaults be entered herein, and said cross-bill be taken as confessed by them and each of them. And it appearing to the court that process of subpœna in chancery was duly issued in this cause against said defendants George A. Sackett and Harriet W. Sackett, returnable to the rule day on the first Monday in July, A. D. 1878, and that each and all of said defendants George A. Sackett and Harriet W. Sackett were duly and personally served with such subpœna more than twenty days
67 prior to such rule day, and have not, nor has any of them, appeared or made answer herein; and it further appearing that said defendants John De Koven, trustee, John Mattocks, successor in trust, and Benjamin W. Underwood, by their respective solicitors, duly entered their appearances in writing in this cause prior to the rule day on the first Monday of June, A. D. 1878, but have not since, nor has any of them, further appeared or made answer herein according to the rule and practice of this court in that behalf, it is ordered and decreed by the court that each and all of said defendants, George A. Sackett, Harriet W. Sackett, John De Koven, trustee, John Mattocks, successor in trust, and Benjamin W. Underwood, come into court here and plead, answer, or demur to the said cross-bill instanter, and said defendants being now severally three times solemnly called so to come and plead, answer, or demurer herein come not, but each and all make default in that behalf; and thereupon it is ordered, adjudged, and decreed by the court that as to them and each of them the said cross-bill be taken as confessed. And it is further, on motion of said complainant's solicitors, ordered by the court that this cause be referred to Henry W. Bishop, esq., master in chancery of this court, to take proofs and report the same to the court, with the
68 amount due the complainant in said cross-bill.

Afterwards, to wit, on the 10th day of October, A. D. 1878, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOHN A. ELLIOTT
v. } In chancery.
GEORGE A. SACKETT ET AL.

On motion of defendants' solicitor, the time for taking proofs herein is extended thirty days.

Afterwards, to wit, on the 14th day of October, A. D. 1878, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOHN A. ELLIOTT
v. } In chancery.
GEORGE A. SACKETT ET AL.

On motion of E. G. Mason, esq., solicitor, this cause is set down for hearing upon the pleadings and proofs herein to be heard on the twenty-fourth day of October instant.

Afterwards, to wit, on the 24th day of October, A. D. 1878, said Henry W. Bishop, esq., the master to whom this cause was referred, filed in said clerk's office, his report in said entitled cause, which said report is
69 in the words and figures following, to wit:

Master's report.

70 In the circuit court of the United States for the northern district of Illinois. In chancery.

JOHN A. ELLIOTT
vs.
GEORGE A. SACKETT AND HUGH T. DICKEY. } Original bill.

and

HUGH T. DICKEY
vs.
GEORGE A. SACKETT, HARRIET W. SACKETT, John A. Elliot, John De Koven, trustee, John Mattocks, successor in trust, and Benjamin W. Underwood. } Cross-bill.

MASTER'S REPORT.

To the honorable the judges of said court:

The above entitled cause having been referred to me as master in chancery of the said court, by an order of the said court entered herein on the third (3rd) day of July, A. D. 1878, to take proofs and report the
71 same to the court, with the amount due the complainant in said cross-bill, I do hereby report that having given notice to the parties interested that a hearing for the purposes in the said order expressed would be had before me at my office, No. 33 National Life Building, La Salle st., Chicago, on the 10th day of October, A. D. 1878, I was attended on said last-mentioned day by E. G. Mason, esquire, of the firm of Mattocks & Mason, of counsel for said complainant in the cross-bill, who produced in evidence before me the said cross-bill and a deed of trust, dated the 12th day of May, A. D. 1870, made between George A. Sackett and Harriet W. Sackett, his wife, party of the first part, and John De Koven, party of the second part, and a principal promissory note, dated the 12th May, 1870, and three (3) interest notes, each dated Nov. 12, 1872, and signed George A. Sackett, and payable to the order of Hugh T. Dickey, being the trust-deed and promissory notes referred to and described in the said cross-bill.

I was also attended on said 10th day of October, A. D. 1878, by William E. Mason, esquire, of counsel for John A. Elliot, the complainant in the original bill and one of the defendants in the cross-bill, and
72 also by John De Koven, George A. Sackett, Walter Mattocks, John W. Ulm, John A. Elliot, each of whom testified herein, and their testimony was duly taken, is hereto annexed, and made a part hereof. I was again attended (by adjour'ment) on the eleventh day of October, A. D. 1878, by said respective counsel and by Henry L. Hill and G. C.

Somers, each of whom testified herein, and their testimony was duly taken, is hereto annexed, and made a part hereof. I further report that from an examination of said cross-bill of complaint, principal and interest notes, deed of trust, and testimony of the various witnesses so as aforesaid produced in evidence before me, and from the exercise of the election to declare the principal due and payable, shown to have been made by the said complainant in the cross-bill, and from a computation of the amount due on said principal & interest notes I find there is due and owing to the said complainant in the cross-bill the sum of nine thousand dollars ($9,000) for the principal, and the sum of sixteen hundred and eighty-nine dollars and seventy-three cents ($1,689.73) for interest thereon and on the
73 overdue and unpaid interest notes to the date of this report, making a total of $10,689.73; and that there is also due and owing to the said complainant in the cross-bill, for payments shown to have been made for taxes which had become due and unpaid on the premises mentioned and described in the said cross-bill and deed of trust, the sum of six hundred and ninety-seven dollars and ninety-two cents ($697.92), and the sum of eleven dollars and sixty-three cents ($11.63) for interest thereon to the date of this report, making the entire amount so found due and owing to said complainant in the cross-bill for principal, payments for taxes, and interest on each to the date of this report, of said principal and interest notes secured by deed of trust and the covenants therein contained of eleven thousand three hundred and ninety-nine dollars and 28 cents ($11.399.28.) I return all the documents used by me in making this report, and make the same a part hereof. All of which is respectfully submitted.

HENRY W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

Dated Chicago, October 22nd, 1878.

74 In the circuit court of the United States for the northern district of Illinois. In chancery.

JOHN A. ELLIOTT
vs.
GEORGE A. SACKETT ET AL. } Bill.

and

HUGH T. DICKEY
vs.
GEORGE A. SACKETT ET AL. } Cross-bill.

Testimony taken before Henry W. Bishop, master in chancery of said court.

THURSDAY, *the 10th day of October*, A. D. 1878.

Present, W. E. Mason, esq., solicitor for complainant, and E. G. Mason, esq., solicitor for the defendant.

JOHN DE KOVEN, a witness on behalf of the defendant Dickey, being

first duly sworn, was examined in chief by E. G. MASON, Esq., and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. My name is John De Koven; of lawful age; business, banker.

Q. Do you know the complainant in the cross-bill, Hugh T. Dickey?

A. Yes, sir.

Q. What is your business relation to him?

75 A. I have charge of his business matters in Chicago.

Q. Do you know the defendant in the cross-bill, John A. Elliott?

A. I have met him.

Q. Do you know whether or not he made any payments of interest upon the note secured by the deed of trust which has been introduced in evidence?

(Objected to as incompetent, immaterial, and irrelevant.)

A. Yes, sir; he did make such payments.

Q. How many?

(Same objection.)

A. Two, I think.

Q. Can you state how the first one was made?

A. I think the first one was made in my office here; that is my recollection.

Q. By whom?

A. By Mr. Elliott.

Q. At what time was that payment made, or on what coupon was it made?

A. On the coupon due in May, 1876.

Q. Have you had any correspondence with Mr. Elliott concerning the payment of interest under this deed of trust?

A. Yes, sir.

Mr. E. G. MASON. (To Mr. W. E. Mason.) Can you produce the originals that have been called for by this notice?

Mr. W. E. MASON. No, sir.

76 Mr. E. G. MASON. We will therefore introduce letter-press copies of letters from the witness De Koven to John A Elliott.

(Counsel for the complainant in the original bill objects to them upon the ground as being incompetent and immaterial, but not upon the ground that they are secondary evidence.)

Q. Have you copies of your letters to Mr. Elliott?

A. Yes, sir.

Q. What is the first letter to him in reference to this subject?

A. The first letter is:

"NOVEMBER 28TH, 1876.

"J. A. ELLIOTT, Esq.:

"DEAR SIR: The interest on the Sackett mortgage for $405.00 fell due November 13, and is unpaid. The policy of insurance on the house is also expired and should be renewed. Please advise me if you intend paying the interest, and also instruct me in regard to the insurance.

"Respectfully,

"JOHN DE KOVEN."

Q. Did you get any answer to that letter?
A. I do not think I did, sir.
Q. Give us a copy of your next letter.
A. My next letter appears to be dated—

"DECEMBER 5, 1876.

"J. A. ELLIOTT, Esq., *Des Moines:*

"DEAR SIR: I wrote you on the 28th with regard to the coupon of $405.00 due on Sackett loan, and also with regard to the
77 insurance, which I have renewed, the premium on which is $37.50. Please advise me at once if you propose paying these amounts, as if not I shall put the papers in the hands of my attorney for foreclosure.

"Yours,

"JOHN DE KOVEN."

Q. Did you receive any reply to that letter:
A. Yes, sir; there is the reply (producing paper).
(Counsel for the defendant Dickey offers the letter in evidence, and it is hereto annexed and marked Exhibit A. The complainant in the original bill admits the signature to the letter to be his own.)
Q. What was your next letter to Mr. Elliott on that subject?
A. The next letter was dated—

"DECEMBER 11, 1876.

"JOHN A. ELLIOTT, Esq.:

"DEAR SIR: Yours of the 7th inst. is received. I do not care to take the property in question, and should be glad to hear from you by return of mail whether you propose paying the interest coupon, as if not I wish to put the matter into my attorney's hand.

"Respectfully,

"JOHN DE KOVEN."

(Letter objected to.)

Q. Did you receive a reply to that letter?
78 A. Yes, sir. (Producing letter.)

(Counsel for the defendant Dickey, offers the letter produced by witness in evidence, and it is hereto annexed, and marked Exhibit B. The complainant in the original bill admits the siguature to be his own.)
Q. Was that a draft for $450.00 enclosed in the letter marked Exhibit B?
A. Yes, sir.
Q. How was that draft applied?
A. It was applied according to my acknowledgement of the letter.

"DECEMBER 14, 1876.

"JOHN A. ELLIOTT, Esq.:

"DEAR SIR: Yours of the 13th inst. received. I enclose the coupon note of G. A. Sackett, $405.00; interest on same, 3.60; insurance premium paid, $37.50; my check, $3.90; total $450. I enclosed bill for insurance;

I had already renewed the policy of insurance before receiving your letter, for one year.

"Respectfully,

"JOHN DE KOVEN."

(Counsel for the complainant, in the original bill, objects to any application if contrary to the instructions in the letter enclosing the draft.)

Q. Have you had any further payments of interest after the payment of that coupon?

A. None since then.

Q. Now, with regard to the coupon that matured in May, 1876,
79 can you remember positively with regard to its payment?

A. I remember positively that it was paid.

Q. And what is your recollection as to the person by whom it was paid?

A. That it was paid to me by Mr. Elliott personally, in my office is my recollection; I merely recollect the fact that it was paid.

Cross-examination by W. E. MASON, Esq.:

Q. You are an attorney in fact for Mr. Dickey, one of the complainants in the cross-bill, are you not?

A. Yes, sir.

Q. Mr. Dickey does not attend to any business here personally, does he?

A. No, sir.

Q. You do all that is done for him?

A. Yes, sir.

Q. Was there ever any consideration passing between you as the attorney in fact of Mr. Dickey, to Mr. Elliott, whereby he should assume this encumbrance.

A. No, sir.

Q. At the time the money was loaned it was loaned to Mr. Sackett, was it not?

A. Yes, sir.

Q. And you loaned that money upon the strength of the property
80 and of Mr. Sackett's note?

(Objected to as immaterial and irrelevant.)

A. Yes, sir.

Q. At the time you wrote the letter of November 28, 1876, did you understand that Mr. Elliott was bound to pay this interest?

A. Yes, sir.

Q. That if he did not pay it that you would hold him personally for it?

A. I could not be sure at that time that I had examined the papers to know. Mr. Sackett told me that he had sold the property to Mr. Elliott in order that I should get my pay. My information came from Mr. Sackett. I had no personal knowledge; no, sir.

Q. Mr. Sackett told you, as I understand, then, that his object in selling the property to Mr. Elliott, so that you should be secured and get your pay?

A. Yes, sir.

Q. At the time that you wrote the letter, December 5, 1876, did you understand that he was bound personally to pay this interest and incumbrance?

A. I could not tell you, sir, what time I found that out.

Q. You cannot remember when you were first instructed?

A. No, sir.

81 (Counsel for the defendant Dickey objects to all this testimony as incompetent.)

Q. Do you know Mr. Elliott's financial standing; didn't you right along, and had known it?

A. Well, I can't tell when I learned it. I have learned that Mr. Elliott was good.

Q. You knew that some time ago, didn't you; when he first came here?

A. Well, that has been my impression all the time.

Q. It has been your impression all the while?

A. That Mr. Elliott was a responsible man.

Q. What is your business?

A. Banker.

Q. In making up your mind and impressions in regard to people's financial standings, you have something tangible, as a rule, to make up your mind upon, don't you?

A. Yes, sir.

Q. You don't take simply hearsay; you want to know, as a rule, when you are dealing with men—you want to have some pretty nearly positive knowledge as to their standing; is not that so?

A. It would depend a great deal upon what the transaction was; whether I was going to loan him money or what.

82 Q. But you had a general understanding that Mr. Elliott was a good man financially?

A. Yes, sir.

Q. That he was good for this amount and more to'?

(Objected to.)

A. Yes, sir.

Q. You say you didn't know whether on November 28th, 1876, you had been informed by Mr. Sackett, that he assumed this incumbrance or not?

A. My impression is that I had been, but I could not state with regard to the date, sir.

Q. Now, Mr. De Koven, in writing to him, a man financially good in your jugdment, if you had been under the impression that he had assumed this incumbrance would you have written him this way: "Please advise me if you intend paying the interest, and also instruct me with regard to the insurance."?

A. Yes, sir; it would not have made any difference.

Q. It would not have made any difference?

A. Not at all, sir. He did not pay when it was due, and therefore I wanted to know if he was going to pay, as if he was not, I should put the matter in suit.

Q. You would put the matter in suit?

A. Yes, sir.

83 Q. On December 5, 1876, you say you don't know whether you had it in your mind that you had assumed this or not?

A. No, I do not.

Q. If you had had it in your mind that he had assumed this incumbrance, would you have written him in this way: "Please advise me at once if you propose paying these amounts, as if not, I shall put the papers in the hands of my attorney for foreclosure"?

A. I don't think it would have made any difference, sir, if I had known he was worth a million of dollars.

Q. Do you say if you had known he was worth a million of dollars, and that he had assumed this incumbrance, that you would have used that language?

A. Well, perhaps if I had known he was worth a million dollars, I might have been a little more courteous in my letter, perhaps.

Q. But that is practically the language you would have used?

A. That is practically. I see no reason why I should have changed that language, sir, if the man did not pay, whether he was a rich man or a poor man.

84 Q. If to-day you had a claim against a man secured by a mortgage that you could reach by suits upon the coupon notes, or by foreclosure, and there was default in the payment of the coupons, what would be your course?

A. Unless a good reason was given me for the delay I should give it to my attorneys for foreclosure.

Q. You would not bring suit upon the notes defaulted?

A. Not unless I thought the property was not perfectly good for the whole amount due on it.

Q. Did you think that in this case?

A. I could not state what my thought was at that time.

Q. What is your best judgment about what your thought was at that time?

A. My best judgment was that at that time it was scant security.

(Objected to.)

Q. Then, sir, if you had understood at that time that he had assumed the notes and incumbrance, and was perfectly good and could be made to pay upon judgment, would you have placed it in your attorney's hands first for foreclosure, or would you have reduced the incumbrance by bringing suit upon the defaulted coupons?

85 A. No one could tell what he would do upon a supposititious case.

Q. This is an actual case?

A. Well, repeat your question.

Q. If at this time you were laboring under the impression that this was scant security, and also knew that Mr. Elliott was perfectly good and could respond for a judgment, would you have placed that in the hands of your attorney for foreclosure, or would you rather have reduced the incumbrance by suing upon the defaulted coupons?

A. No, sir; I should have placed it in the hands of my attorney for foreclosure, most certainly.

Q. You would?

A. Yes, sir.

Q. If you knew he was abundantly good to have paid the judgment?

A. That would not have made any difference, sir; a deficiency decree would have been good against him if he was abundantly good.

Q. And you would take that course?

A. Certainly; have always taken that course.

Q. Would you, in writing to such a man, say, that unless you pay I shall put in the hands of my attorney for foreclosure, or would you say, as you have stated once before in your evidence, "Put it in suit"?

86 A. Well, by putting it in suit I mean foreclosure.

Q. Hav'n't you brought suit on any coupon defaulted notes?

A. I don't think I have; no, sir; not on defaulted interest notes, of course I mean; I have a good many defaulted notes.

Q. So you cannot tell, you say, whether at the time you wrote this letter on December 5th, 1876; you cannot tell from the tone of the letter whether you understood that he had assumed that incumbrance or not?

A. No, sir.

Q. And you say that laboring under the impression that the property was scant security, believing that he was abundantly good financially, and that he had assumed this as a part of the consideration, that you would write him a letter in the language of your letter of Dec. 5, 1876?

A. Exactly; because I am not lawyer enough to know that I would have had the right to sue Mr. Elliot on Mr. Sackett's notes, except by foreclosure and collecting from him a deficiency decree, owing to the fact of his having assumed it; I never should have understood, and do not now, although it may be the fact that I could have sued Mr. Elliot in

87 any other way than the way I have done.

Q. On December 11, 1876, you wrote another letter. I will read it to you: "Yours of the seventh instant received. I do not care to take the property in question. I should be glad to hear from you by return of mail whether you propose paying the interest coupons, as if not, I wish to put the matter into my attorney's hands." Can you tell from the tone of that letter whether at that time, December 11, 1876, you understood that he was to assume this incumbrance?

A. From the tone of the letter I should judge that I did, sir.

Q. From the tone of the letter you should judge that you understood that he had assumed the incumbrance?

A. Yes, sir.

Q. Will you please tell me where there is any distinction between the letter of December 11, 1876, and *and* the tone of the letter of December, 5, 1876?

A. Read the letter of the 5th.

Q. The 5th is: "Please advise me at once if you propose paying these amounts, as if not I wish to put the papers in the hands of my attorney for foreclosure." The next letter is: "Yours of the 7th received.

88 I do not care to take the property."

A. That is sufficient, because in that letter I am answering his letter of the 7th, in which he offers to deed me the property for $300. If I had not understood or supposed at that time that Mr. Elliott was responsible, I had much better have accepted that proposition and gone ahead with the foreclosure.

Q. Then you think that Mr. Sackett must have informed you of this assumption, for you say that he did inform you?

A. Yes, sir.

Q. Between December 5, 1876, and December 11, 1876?

A. Either he informed me, or my attorneys must have informed me. No, sir; I do not say that, because I didn't know but what I knew that fact when I wrote that letter, but I was informed some time by my attorneys, and by Mr. Sackett, of these facts. When that date was I don't know, but should judge, from the tone of my letter—the last letter—that I knew it then, but there would be nothing in the tone of my letter of December 5th that I knew it then. You ask me the difference between the two letters.

89 Q. Then you pretend to say that the fact that he offered to deed this property to you for $300, and the fact that you replied to it declining to take it convinces him, in your own mind, that you must have known at that time that he had assumed it?

A. Yes, sir.

Q. But you don't know when you first learned that?

A. No, sir.

Q. You did not know it at the time the deed was made, did you?

A. At the time the deed was made to Mr. Elliott?

Q. Yes, sir.

A. I dare say that I did, sir.

Q. Did Mr. Sackett tell you in advance of this trade that he was going to have Mr. Elliot assume this thing?

A. He told me, at the time that he made the trade with Mr. Elliot, that he had made it. I dare say that he informed me at that time. Mind you I don't swear to this. I say that he may have told me at that time. I have no recollection of the time when it was told to me.

Q. Do you recollect ever requesting Mr. Sackett to so make that deed that Mr. Elliot should assume this incumbrance?

A. No, sir.

Q. Are you certain that you never did make any such request?

A. I have no recollection of it, sir.

90 Q. Would you recollect it if you had, possibly?

A. Probably should.

Q. You are not certain that you did not?

A. We are certain of very little of what happened two or three years ago; but I have no recollection of it.

Q. Will you swear that you did not?

A. No; I would not swear that I did not, but I would swear that the probabilities were that I did not, for I don't think I knew anything of the trade until after it was made.

Q. Had Mr. Sackett proposed to you at this time, at the time he made this trade, to take the property and release him from those notes?

A. No, sir.

Q. Did he ever do it?

A. I have no recollection of his ever doing it.

Q. Had he, at the time he made this trade with Elliott, ever done it before that?

A. I do not think he ever had.

Q. Are you positive of that?

A. I think so.

Q. In what way are you interested in this matter, Mr. De Koven; no way, except as the agent of this gentleman?

A. Not at all. I have no pecuniary interest in the matter at all.

91 Q. Except you do business on a commission for him?

A. Not at all, sir. Judge Dickey is my brother-in-law. He pays me a certain amount each year for taking care of his business in the way of a salary. I act for him the same as I would for my bank.

Q. Then you are employed by him by the year to do the business for him?

A. Yes, sir.

Q. In that way simply you are interested?

A. I am a clerk really for Judge Dickey in this matter. I have had charge of this property for thirteen years.

Q. Mr. Elliott has never agreed with you to assume this encumbrance?

A. Not with me personally, unless he did it by his deeds.

Q. Unless he did it by Mr. Sackett's deed, you mean?

A. By Mr. Sackett's deed; yes, sir.

Q. There has been no actual agreement between you? There may be a legal agreement, you claim, but there has been no actual agreement between you and Mr. Elliott that he was to assume it, was there?

A. No, sir.

Q. And there has been none between him and Mr. Dickey that you know of?

92 A. All this business has been done with me, sir. Mr. Dickey would not figure in it at all except through me.

Q. Mr. De Koven, now do you think that you figured in this trade between Mr. Sackett and Mr. Elliott at all, or was consulted about it?

A. I don't think I was.

Q. Are you positive about that, sir?

A. I am not positive; no, sir.

Q. You may have been consulted?

A. I may have. Mr. Sackett was in the habit of coming into our office every day. He would have been very apt to have told me that he was making a trade of this property, and may have done so.

Q. Did you advise him or request him before he made the trade to get Mr. Elliott to assume the incumbrance?

A. No, sir.

Q. Are you positive of that?

A. Yes, sir.

Q. Didn't you state just now that you was not positive of that?

A. Well, I will qualify that. I cannot be positive about anything that occurred so long ago. I have no recollection of ever advising him on the subject.

93 Q. Did you ever have any conversation with Mr. Elliott in regard to this matter since he learned that the deed contained a clause of assumption?

A. No, sir; I have not seen Mr. Elliott since then until to-day.

Q. Have you ever had any conversation with Mr. Sackett in regard to that?

A. Yes, sir.

Q. Have you ever taken occasion to thank him and congratulate him on the successful manner of getting Mr. Elliott to assume this?

A. I don't think I have.

Q. Have you felt under obligation for this at all to Mr. Sackett on behalf of Mr. Dickey, your employer?

A. I have no doubt I have felt glad that Mr. Elliott assumed the mortgage.

Q. It was your wish that he should assume it; you rather wished that he would assume it, didn't you?

A. I was very glad to know that he had assumed it.

Q. You say the probabilities are that you knew of the trade in advance?

A. No; I did not.

Q. I understood you to say so; didn't you say that Mr. Sackett was in your office almost every day?

A. I said it was very possible that he may have told me.

Q. Didn't you say it was very probable that he did tell you about the trade?

A. Well, I don't know.

94 Q. Isn't it quite probable that he did talk with you about the trade?

A. It is possible, but I do not know it is probable.

Q. How often do you say he came into your office?

A. Almost every day.

Q. Talked about his business generally, didn't he?

A. Not a great deal.

Q. But some?

A. Yes, sir.

Q. Did you have any other incumbrance upon his property?

A. No, sir.

Q. Was he behind in the payment of his interest?

A. No, sir.

Q. Never had been?

A. I don't think he ever has been.

Q. You say that you were glad to learn that Mr. Elliott had assumed the encumbrance?

A. Yes, sir.

Q. Now, if the matter was talked over between you and Mr. Sackett before the consummation of the trade, is it not probable that you advised him, and asked him to get Mr. Elliott to assume this encumbrance?

A. I have stated before that I have no recollection of asking

95 Mr. Sackett to get Mr. Elliott to assume this mortgage.

Q. I am asking you now as to probabilities; I wish you to take into consideration the interest that you had from Mr. Dickey in the matter, take into consideration your interests and the interests of your employer, and then answer the question whether or not if Mr. Sackett consulted you about this, you did not probably advise him to get Mr. Elliott to assume the incumbrance?

A. Had he consulted me beyond this particular point I should have advised him to.

Q. You deemed Mr. Sackett not thoroughly good financially, didn't you? Don't you know about that time he had had losses on the board of trade?

A. I could not state the date *tha*t which I first learned that Mr. Sacket was not responsible.

Q. Wasn't there a balance in your bank against Mr. Sacket at that time? Hadn't he overdrawn his account in your bank?

A. I don't recollect, sir, whether he had or not.

Q. You are not positive that he had or had not?

A. I have no recollection, sir; I do not carry those things in my mind at all.

96 (All this testimony is objected to by defendant Dickey as not proper cross-examination and irrelevant.)

Q. Mr. De Koven, you don't wish to say that Mr. Sackett did not consult you about this trade, do you?

A. I have no recollection of his consulting me.

Q. You do recollect that he said he had made the trade, and for your protection had got Elliot to assume the incumbrance?

A. He has told me since the trade was made that Mr. Elliott had assumed the incumbrance, and that he sold the property and got Mr. Elliott to assume it for the purpose of protecting me; and when that statement was made to me, I could not say whether it was within a year or at that time; I can swear to the copies of my letters.

Q. Would you infer from that, sir, that he did not deem himself competent to protect you financially?

A. From what he told me, when he did tell me, I did infer that.

Q. That he thought himself incompetent at the time he made the trade to protect you financially?

A. Well, I did infer from what he told me that he made this trade for the purpose of protecting me.

97 Q. Well, didn't you infer from what he told you that he considered himself incompetent to take care of you at the time he made the trade?

A. I should from what he told me; I should consider that he did think so at that time.

Redirect examination by E. G. MASON, Esq.:

Q. Did you know Mr. Elliott in March, 1876?

A. I never knew Mr. Elliott till he paid me the first coupon, which was May, 1876.

Q. Did you know anything about his financial standing prior to that time?

A. I did not know him at all, sir.

Signature waived by agreement of counsel.

98 [Office Elliott & Sibley, successors to N. T. Vorse, dealers in agricultural implements, Aultman & Taylor vibrators, and the celebrated Schutler and Fish wagons, 217 & 219 Walnut street.]

DES MOINES, IOWA, *Dec.* 7, 1876.

JOHN DE KOVEN, *Chicago:*

SIR: In reply to your favor would say that I can get your title to the Calumet premises on which you have a lien of $9,000 for $300—including furnace and gas fixtures. This would give you full possession and title cheaper than you can foreclose and get it, and leaves title without a defect. What do you think of it? Let me know at once.

Yours, &c.,

JNO. A. ELLIOTT.

99 [Office Elliott & Sibley, successors to N. T. Vorse, dealer in agricultural implement, Aultman & Taylor vibrators, and the celebrated Schutler and Fish wagons, 217 & 219 Walnut street.]

DES MOINES, IOWA, *Dec. 13th*, 1876.

JOHN DE KOVEN, *Chicago:*

SIR: Enclosed find draft $450, to pay coupon interest on the Calumet premises, and insurance. Please insure for two years. I have had this property tied up for some time and thought it sold, but now think not. This delay should not have occurred otherwise. Send coupon and statement, and oblige,

Yours, truly,

JNO. A. ELLIOTT.

100 In the circuit court of the United States for the northern district of Illinois.

JOHN A. ELLIOTT, COMPLAINANT, *vs.* GEORGE A. SACKET ET AL., DEFENDANTS. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court.

THURSDAY, *the 10th day of October, A. D.* 1878.

Present, W. E. Mason, esq., complainant's solicitor, and E. G. Mason, esq., solicitor for defendant Dickey.

GEORGE A. SACKETT, a witness on behalf of the defendant Dickey in original bill, and complainant in cross-bill, being first duly sworn, was examined in chief by Mr. E. G. MASON and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation?

Ans. My name is George A. Sackett; residence, Geneva, Ill.

Q. Do you know the complainant in the original bill, Mr. Elliott?

A. Yes, sir.

101 Q. You were formerly the owner of the premises described in the deed which has been introduced in evidence from yourself and wife to John A. Elliott.

A. Yes, sir.

Q. About what time did you begin negotiations for the sale of that property?

A. It was in the month of January, 1876.

Q. What steps did you take then to sell the property?

A. I engaged Mr. Hill to make sale of the property.

Q. Mr. Henry L. Hill?

A. Yes, sir.

Q. What was his business?

A. He was a real estate agent.

Q. Well, after that, what was the next step in the negotiation?

A. Well, Mr. Hill had the property some time in his possession for sale, several months; and finally he told me he had a proposition from Mr. Elliott. The property he offered was not satisfactory, and I did not accept it.

Q. Do you remember what property that was?

A. Well, it was a piece of property, three lots, up in Evanston. Three lots first, in Evanston, with an incumbrance of some seventeen or eighteen hundred dollars; I guess it was seventeen hundred and fifty dollars incumbrance. Well, afterwards Mr. Elliott added another lot, and one
102 hundred and twenty acres of land in Iowa. I depended on Mr. Hill entirely for the trade. I did not know anything about the value of this property.

Q. What was the encumbrance on the property described in this deed?

A. Nine thousand dollars.

Q. What were your instructions about that incumbrance to Mr. Hill?

(Counsel for complainant in the original bill objects to any evidence of any conversation or instruction between Mr. Sackett and his agent, because it is immaterial and incompetent to bind the complainant in the original bill.)

A. I instructed him to sell the property subject to the incumbrance, so as to free me from all liability. My object was to save something out of the property and to realize a little something besides, if I could; property was declining, and it looked very dubious whether I could get much or anything out of it over the incumbrance. I considered the property well worth the incumbrance and two or three thousand dollars additional.

Q. Was that the authority that Mr. Hill had at first?

(Same objection.)

A. Yes, sir.

103 Q. What was his report to you?

(Same objection.)

A. He never said anything to me about Mr. Elliott refusing to assume the liability, for I should never have sold the property without he had—never, and that was my terms to him, and my idea throughout; and I made the deed out the same way.

Q. Who drew the deed?

A. I drew it myself.

Q. When did you first meet Mr. Elliott?

A. Well, I should think it was some time in January; the middle or latter part of January.

Q. Did you have any conversation with him about the property?

A. Yes, sir; about his property up there and this property down here.

Q. Where was it—where did you meet him.

A. In Mr. Hill's office.

Q. Did he then refuse or decline to assume this liability in conversation with you?

A. I never had any conversation between Mr. Elliott and myself in regard to that liability. I depended on Mr. Hill as my agent in fixing that thing.

Q. According to your instructions?

A. Yes; according to my instructions.

104 Q. Well, when did you meet Mr. Elliott next?

A. Well, we went up to Evanston, Mr. Hill and Mr. Elliott and myself, on invitation of Mr. Elliott, to look at the property. I was not satisfied with the property. I did not think it was enough. Mr. Elliott afterwards added some; I think a lot. I forget whose addition—a lot and one hundred and twenty acres of land in Iowa; and I accepted the proposition.

Q. Did Mr. Hill have any authority from you in writing in relation to this matter.

A. No.

Q. Well, then, after the proposition was accepted, when did you meet Mr. Elliott next?

A. After the acceptance, I think we met together in the office and passed our deeds to each other.

Q. You had the deed which has been introduced in evidence which you wrote?

A. Yes, sir.

Q. Did you hand that to Mr. Elliott yourself?

A. Yes, sir.

Q. What did he do with it?

A. He took it and read it, and I took his.

105 Q. Was anything else exchanged except the two deeds between you?

A. No.

Q. Any money paid?

A. Yes, sir; I think I gave him a check for fifty dollars, I believe.

Q. You gave him a check for fifty dollars?

A. Yes, sir; some little difference; I have forgotten what it was. Mr. Elliott mentioned it this morning. I have forgotten the items. I know there was a difference of interest which was due, and, I think, there were some taxes.

Q. Then, did you also give him a note?

A. Yes, sir.

Q. How was the amount of that note arrived at; what did it represent, if you remember?

A. I think it represented the difference of the taxes; I was very hard up, and I could not spare the money to pay it, and I gave Mr. Elliott a note for the difference, payable at some bank here, I think.

Q. Did the interest on the incumbrance enter into that note, if you remember?

A. It did.

Q. Was there a computation made at the time of the portion of the interest you had to pay?

106 A. Yes, sir.

Q. At the time that you and Mr. Elliott were there?

A. Yes, sir.

Q. And you arranged to pay your part up to the date of the delivery of the papers?

A. Up to the date of the purchase.

Q. How did Mr. Elliott appear that day with reference to his capacity to transact business?

A. I thought Mr. Elliott appeared as I have always seen him: I did not see any difference.

Q. How had he appeared to you generally, as a man competent to transact business or otherwise?

A. Yes, sir.

Q. Competent to transact business?

A. Yes, sir.

Q. Was there any special appearance of ill-health or absence of mind?
A. I did not see any.
Q. Or want of concentration of mind?
A. No, sir; I did not see anything. I did not know of any.
Q. Did you see Mr. Elliott after this trade was closed at any time?
A. Yes, sir.
Q. Do you remember when or about what time?
A. I think I saw him in the summer; I could not pay the note. I was using a great deal of money and got cleaned out on the board of
107 trade, and Mr. Elliott commenced suit against me. It was in Mr. Mason's office, I think. I saw Mr. Elliott once or twice.
Q. During the summer of 1876?
A. Yes, sir.
Q. Did he say anything to you then about this deed?
A. No.
Q. Has he at any time subsequent?
A. No, sir.
Q. Down to the commencement of this suit?
A. No, sir.

Cross-examination by W. E. MASON, Esq.:

Q. What was your condition financially at the time you made this trade with Mr. Elliott?
(Objected to as improper cross-examination.)
A. I was doing business on the board of trade, and I had some means, some few thousand dollars in cash in my business.
Q. At the time you drew this deed, what was your condition financially?
A. Well, I had money; I was in a fair condition then.
Q. You considered that worth two or three thousand dollars over and above the incumbrances?
A. Yes, sir.
108 Q. They would have taken it back, would they not, at the time for the incumbrance; didn't they offer to do that?
(Objected to.)
A. Mr. De Koven had offered.
Q. Mr. Sackett, if you had considered that worth two or three thousand dollars, at least that, over and above the incumbrance, why were you so very anxious to have somebody assume the incumbrance, if the property was surely good for it?
A. Property was dropping all the while, and I did not know but it might go down so that I should not get anything; I wanted to save something.
Q. Who is De Koven?
A. He is cashier of the Merchants' National Bank.
Q. He is the trustee in this case.
A. He is Judge Dickey's agent.
Q. The agent of the trustee?
A. Yes, sir.
Q. And the man that you paid the interest to?
A. Yes, sir.

Q. Now, Mr. Sackett, at the time you handed this deed to Mr. Elliott, do you say that he read the deed clear through?

A. I don't know. Mr. Elliott took up the deed; I suppose he did, of course; that is my impression; a man naturally would. I could not
109 say he did not read it aloud, and of course I could not tell.

Q. Then, you are not prepared to swear that he did absolutely read it clear through?

A. No; I could not say that.

Q. He simply picked up the deed, as he has stated in his evidence?

A. Yes, sir; he picked up the deed, and was some time in looking it over.

Q. How long, should you say?

A. Sufficient time to read all the written part of the deed.

Q. You will swear that he had it in his hands sufficient time to read the deed through?

A. The written parts of it.

Q. All the written parts?

A. Yes, sir.

Q. What has your business been before you were on the board of trade?

A. I used to be a merchant.

Q. Before that what was your business?

A. Well, I have been a merchant since I was seventeen years old.

Q. Hav'n't you practiced law at some time in your life?

A. No, sir.

Q. You have tried cases occasionally?

A. No, sir.

Q. Have you done a good deal of conveyancing yourself?
110 A. Yes, sir.

Q. You have done your own law business, hav'n't you, a good deal?

A. Well, I have a good deal; yes, sir. I have had some cases in chancery where I have drawn up my answers, but still they have always been corrected by my attorneys.

Q. Who has been your attorney in this case?

A. Mr. Mason is representing it now.

Q. Representing you?

A. Yes, sir.

Q. Don't you recollect of stating to different parties at different times within the last few years that you had practiced law practically more or less; that you had done your own law business?

A. No, sir.

Q. No recollection of saying that?

A. There are some Sacketts here that are lawyers in the city. I don't know them.

Q. Don't you recollect of stating to me at one time that you were a sort of a half lawyer?

A. Well, I can't say that. I have had a good deal of it in various courts, and have been very extensively engaged in business before I came to Chicago.

Examination continued Saturday, the 19th day of October, A. D. 1878.

111 Present, W. E. Mason, esq., solicitor for the complainants, and E. G. Mason, esq., solicitor for the defendant Dickey.

Witness produces and attaches to his deposition a warranty deed from John A. Elliott and wife to him, which was called for by counsel for the complainant in the original bill, and marked Exhibit A.

Direct examination by Mr. E. G. MASON:

Q. Mr. Sackett, when you sold the property in controversy to Mr. Elliott, what price was agreed upon for this property of yours?

(Counsel for complainants in the original bill objects to the question for the reason that it is incompetent, immaterial, and irrelevant.)

A. Fifteen thousand dollars ($15,000).

Q. How was that fifteen thousand dollars paid to you, if at all?

A. It was paid by the assuming of the mortgage, which was nine thousand dollars ($9,000), and some lots in Evanston—four lots in Evanston —and one hundred and twenty acres of lands deeded to my wife,

112 in consideration of her right of dower. I could not get her to sign the deed for some time, and I offered to give her this hundred and twenty acres of land received from Mr. Elliott in this trade.

Q. When you speak of the assuming of the incumbrance, by whom do you mean it was assumed?

A. By Mr. Elliott.

Q. When you speak of your wife's right of dower, in what property do you refer to?

A. In the property sold to Mr. Elliott.

Q. By you?

A. By me.

Q. At the time you closed the trade with Mr. Elliott, to whom was the Iowa land deeded?

A. To my wife.

Q. By whom was it so deeded?

A. By Mr. Elliott and his wife.

Q. You say there were four lots altogether deeded to you at Evanston?

A. Yes, sir.

Q. By Mr. Elliott?

A. Yes, sir; four lots.

Q. Did the encumbrance cover all of them?

A. No, sir.

Q. How many of them?

A. Three of them.

Q. There was one lot free of incumbrance, then?

113 A. Yes, sir.

Q. Do you still own that lot?

A. No, sir.

What has been done with it, if anything?

(Question objected to as immaterial.)

A. I turned it over to Mr. Elliott for indebtedness I owed him.

Q. When?

A. In the summer of 1876.

Q. What indebtedness?

A. It was for the balance of interest and taxes.

Q. Due on what?

The balance of interest due on the incumbrance, and taxes on the Calumet lots.

Q. The Calumet lot was the lot spoken of in the testimony which you deeded to Mr. Elliott?

A. Yes, sir.

Q. Do you still own the other three lots in Evanston?

A. No, sir.

Q. What, if anything, have you done with these lots?

A. I deeded them to Chauncy P. Blair.

Q. For what consideration?

A. Two thousand dollars, ($2,000).

Q. When or about what time was this conveyance to Mr. Blair?

A. Soon after I received the deed from Mr. Elliott.

114 Q. Before the year 1877?

A. Yes, sir; in the year 1876.

Cross-examination by Mr. W. E. MASON:

Q. With whom have you talked in regard to the consideration since the time your evidence was taken before in this case?

A. I do not remember any person in particular.

Q. Have not you talked with any one about that point?

A. I am not aware of any particular person.

Q. Have you, or not, talked with any one upon that point?

A. I presume I have, but I cannot recollect any conversation with any one.

Q. Don't you know that you have?

A. I presume I have.

Q. Don't you know that you have?

Mr. E. G. MASON:

Q. The question is, since you were examined here the other day?

A. No.

Mr. W. E. MASON:

Do you say you have not talked with any one in regard to the consideration since you were examined before in this case?

A. No, sir.

115 Q. You are positive of that?

A. Yes, sir.

Q. Not with Mr. De Koven nor with Mr. Mason?

A. I may have had some little conversation with Mr. Mason.

Q. You may have talked with Mr. Mason about that?

A. Yes, sir.

Q. Did you suggest it to Mr. Mason?

A. No.

Q. How long had you known Mr. Hill when you put this property in his hands for sale?

A. For several years.

Q. Had you great confidence in him?

A. Yes, sir.

Q. Did you ever tell Mr. De Koven that you had Mr. Elliott assume this incumbrance for the purpose of protecting him?

A. Yes, sir.

Q. You have heard Mr. De Koven testify?

A. Yes; I heard Mr. De Koven the other day. I could not tell whether he testified fully to that or not, but I told Mr. De Koven that I had sold that house to Mr. Elliott, and Mr. Elliott assumed the incumbrance and was a very wealthy man.

Q. And that you did it to protect him, did you so state?

A. I do not remember.

Q. Do you say you were able to protect him at that time?

116 A. Yes, sir; I thought I was at the time I made the sale.

Q. Then, if you did so state to him, was it in reality to protect Mr. De Koven or to protect you?

A. Well, it was to protect me.

Q. Could you have stated to Mr. De Koven about that time you did sell it to protect him—sell it to Mr. Elliott to get him to assume it to protect Mr. De Koven.

A. I do not remember that I said so.

Q. Do you think you did?

A. Very likely I might have said so. I was very anxious. I had been losing a good deal of money and felt very blue; everything was rather dark.

Q. You think you have talked some to Mr. Mason in regard to this point or consideration since you were examined here the other day?

A. There was something said about it in Mr. Mason's office.

Q. He suggested it to you, did he?

A. Well, he spoke something about it.

Q. You did not suggest it to him?

A. No.

Q. It did not occur to you then?

A. Well, I spoke to Mr. Mason about the responsibility of assuming the incumbrance; that Mr. Elliott reading over that deed could not fail to see the object, and I believed that Mr. Elliott considered it a good

117 bargain, and probably that was the reason that he made no objection to the wording or to assuming the incumbrance. If he had not assumed it we should not have any trade. I should not have passed the property. My object, I being an old man, I did not want to have these things hang over. I never sell a piece of property otherwise than to a party who assumes the incumbrance, and never would.

Q. Did Mr. Hill ever tell you that Mr. Elliott had ever refused to sign that contract—the first contract drawn for him because he had put into the contract that he, Mr. Elliott, was to assume the incumbrance?

A. No, sir.

Q. You are certain of that?

A. Yes, sir; that would have been an end to all trading.

Q. How many different contracts did you sign?

A. One.

Q. Do you swear that you did not sign two?

A. Yes, sir.

Q. Did you have the contract before you when you drew this deed?

A. No.

Q. Did not you know when you drew this deed that the contract contained no clause of assumption?

118 A. No, sir.

Q. Do you think the contract contained an affirmative clause of assumption by Elliott?

A. I did not pay much attention to the contract. I took it that the contract was merely a paper that Mr. Hill wanted to insure his commissions. I did not consider the contract as amounting to anything.

Q. You did not consider the contract as amounting to anything?

A. No.

Q. You paid no attention to the terms of the contract when you read it over, did you?

A. Yes, sir; I read the copy; I have forgotten what it was.

Q. You may have signed it without reading it?

A. No, I do not believe I did; but if I did sign that contract, my whole object was to have that incumbrance assumed.

Q. Did you read that contract?

A. I presume so; I could not swear to it.

Q. You are not certain that you did?

A. I must have read the contract.

Q. You must have read the contract?

A. Yes sir.

Q. Did not you observe there was no clause of assumption in the contract?

119 A. No, sir.

Q. Who had possession of the contract after it was drawn and signed?

A. I think Mr. Hill had it.

Q. You never have had it in your hands since the day you signed it, have you?

A. I do not know whether I have or not.

Q. Is it not your best recollection that you have not?

A. No.

Q. Do you think you have had it since you signed it?

A. I think I have had it.

Q. When?

A. I think it must have been after it was signed. I cannot recollect; I did not pay that much attention to it; I did not think it amounted to anything. It was for Mr. Hill to secure his commission.

Q. You did not consider it as anything, except in the interest of Mr. Hill?

A. No.

Q. You did not ask for it when you drew the deed?

A. No, it was new a mode of selling property, which I had not been accustomed to. It was new to me.

Q. What is your financial condition?

A. I am pretty slim just now.

Q. Are you solvent or insolvent?

A. Insolvent—cleaned out.

120 GEORGE A. SACKETT.

Subscribed and sworn to before me this 19th day of October, A. D. 1878.

HENRY W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

121 This indenture witnesseth that the grantors, John A. Elliott and Martha J. Elliott, his wife, of the city of Chicago, in the county of Cook and State of Illinois, for and in consideration of the sum of six thousand four hundred dollars in hand paid, convey and warrant to George A. Sackett, of the county of Kane and State of Illinois, the following described real estate, to wit: Lots number eight (8), nine (9), and ten (10), in block five (5), in Pitner & Son's addition to South Evanston, according to a plat of said addition recorded in the recorder's office of Cook County, book eight of plats, page fifty-two, subject, however, to an incumbrance of seventeen hundred and fifty dollars ($1,750), and interest at the rate of eight per cent. per annum, accrued since June the first, A. D. 1875, due June 1st, 1876, situate in the County of Cook in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this State.

Dated this eighteenth day of February, A. D. 1876.

JNO. A. ELLIOTT. [SEAL.]
MARTHA J. ELLIOTT. [SEAL.]

122 STATE OF ILLINOIS,
County of Cook, ss:

I, J. R. Custer, a notary public in and for the said county, in the State aforesaid, do hereby certify that John A. Elliott and Martha J. Elliott, his wife, personally known to me to be the same persons whose name' are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this ninth day of March, A. D. 1876.

[SEAL.] J. R. CUSTER,
Notary Public.

(Endorsed:) Warranty deed, statutory form. Jno. A. Elliott and wife to George A. Sackett. No. 76150.

STATE OF ILLINOIS,
County of Cook, ss:

This instrument was filed for record in the recorder's office of Cook County aforesaid, on the 11th day of March, A. D. 1876, at 9 o'clock a. m., and recorded in book 568 of records, on page 310.

JAS. STEWART, *Recorder.*

123 In the circuit court of the United States for the northern district of Illinois. In chancery.

JOHN A. ELLIOTT
vs.
GEORGE A. SACKETT ET AL. } Bill.

HUGH T. DICKEY
vs.
GEORGE A. SACKETT. } Cross-bill.

Testimony taken before Henry W. Bishop, master in chancery of said court.

THURSDAY, *the 10th day of October, A. D.* 1878.

Present, W. E. Mason, esq., complainant's solicitor, and E. G. Mason, esq., solicitor for defendant Dickey.

E. G. MASON, a witness on behalf of the defendant Dickey, being first duly sworn, deposes and says as follows:

I have computed the amount due under this deed of trust for principal, interest, and taxes, and interest on the same, and find it to be the sum of $11,365.91.

Signature waived by agreement of counsel.

124 In the circuit court of the United States for the northern district of Illinois.

JOHN A. ELLIOTT, COMPLAINANT,
vs.
GEORGE A. SACKETT ET AL., DEFENDANTS. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court.

THURSDAY, *the 10th day of October, A. D.* 1878.

Present, W. E. Mason, esq., solicitor for complainant in original bill, and E. G. Mason, esq., solicitor for defendant in original bill.

Solicitor for the complainant in the cross-bill introduces in evidence the deed of trust from George A. Sackett and wife to John De Koven of the premises in controversy.

Also the note referred to in the deed of trust, for $9,000, and three coupons for $405 each, due May 12, 1877, November 12, 1877, and May 12, 1878.

125 This indenture, made this twelfth day of May, in the year of our Lord one thousand eight hundred and seventy (A. D. 1870), between George A. Sackett and Harriet W. Sackett, his wife, of Geneva, in the county of Kane and State of Illinois, party of the first part, and John De Koven, of the city of Chicago, county of Cook, and State of Illinois, party of the second part, witnesseth: That whereas the said George A. Sackett has this day executed his certain promissory note bearing even date herewith, for the sum of nine thousand dollars ($9,000), payable to the order of Hugh T. Dickey, at his office in the city of Chicago, three years after date, with interest after maturity at the rate of ten per cent. per annum, the interest on said note until maturity thereof at the

rate of nine per cent. per annum, being secured to be paid semi-annually by six (6) certain interest notes given therewith, each for the sum of four hundred and five dollars ($405), and due, respectively, November 12, A. D. 1870; May 12, A. D. 1871; November 12, A. D. 1871; May 12, A. D. 1872; November 12, A. D. 1872, and May 12, A. D. 1873. And whereas
126 the said party of the first part are desirous of securing not only prompt payment of said promissory note above mentioned, with interest thereon, but also of effectually securing and indemnifying the said Hugh T. Dickey, or his legal representative, for or on account of any assignment, endorsement, guaranty, or transfer of said promissory note:

Now, therefore, the said party of the first part, in consideration of the premises, and for the purposes aforesaid, and in the further consideration of the sum of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have and do hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs, assigns, or successors, in trust forever, all the premises situate in the county of Cook and State of Illinois known and described as lot number fifteen (15) and part of lot number ten (10), in Gurley's subdivision of blocks number twenty-five (25), twenty-eight (28), and thirty-eight (38), in the canal trustees' subdivision of the west half of section number twenty-seven (27), township thirty-nine (39) north, range fourteen (14) east of the third (3rd) principal meridian, bounded as follows, to wit: Commencing on the west side of Calumet
127 avenue ninety-four and fifty-three hundredths (94 $\frac{53}{100}$) feet north of Twenty-fourth street, running thence along said avenue north fifty (50) feet; thence west and parallel with Twenty-fourth street one hundred and twenty-six (126) feet; thence south parallel with Calumet avenue fifty (50) feet; thence east one hundred and twenty-six (126) feet to the place of beginning, together with all buildings and improvements now standing on said premises, or which may hereafter be erected on the same, or any part thereof, to have and to hold the same, together with all and singular the privileges and appurtenances thereunto belonging, in trust, nevertheless, that in case of default in the payment of the said promissory note, or the interest hereon, or any part thereof, according to the true meaning, tenor, and effect of the said promissory note, then, on the application of the legal holder of the said promissory note, it shall and may be lawful for the said party of the second part, his heirs, assigns, or successors in trust, either in person or by attorney, to sell and dispose of the said property or premises herein described, and all the right, title, benefit, and equity of redemption of the said party of the first part, their heirs or assigns, therein, at
128 public auction, at the north door of the court-house, in the city of Chicago, county of Cook, and State of Illinois, to the highest bidder or bidders, for cash, first giving notice of the time and place of such sale by publishing such notice in one of the newspapers at that time published in said city, by ten daily publications in such paper, the last of which shall be at least thirty days before such sale, which sale may be adjourned from time to time, as may by said party of the second part, his heirs, assigns, or successors in trust, be thought expedient, by public proclamation or otherwise (personal notice of said party of the first part of

such sale or adjournment of sale being hereby expressly waived), and said party of the second part is hereby fully authorized to make, execute, and deliver to the purchaser or purchasers at such sale, or adjourned sale, good and sufficient deed or deeds of conveyance for the premises sold; and out of the proceeds of such sale, after first paying all costs of advertising, the sale, commissions, and other expenses of this trust, including all money advanced for insurance, taxes, assessments or liens of any kind on said premises, with interest thereon at ten per cent. per annum, to pay the
129 amount which shall by said promissory note appear to remain unpaid at the time of such sale, rendering the overplus, if any, unto the said party of the first part, their legal representatives or assigns, on reasonable request, and it shall not be obligatory upon the purchaser or purchasers at any such sale to see to the application of the purchase money, which sale or sales so made shall be a perpetual bar, both in law and equity, against the said party of the first part, their heirs and assigns, and all other persons claiming the premises aforesaid, or any part thereof, by, from, through, or under said party of the first part, or any of them.

And the said party of the first part, for their heirs, executors, administrators, and assigns, do further covenant and agree that they will pay or cause to be paid all taxes and assessments which may be levied or assessed on said premises, or any part thereof, while said promissory note remains unpaid, and if, in consequence of their neglect to pay said taxes or assessments, the said premises, or any part thereof, shall be advertised for sale for the tax or assessment due thereon, it shall and may be lawful for the said party of the second part, or his attorney, or the legal owner or
130 holder of said promissory note, at his option, at any time to pay and discharge said tax or assessment, or to redeem the said premises, or any part thereof, which have or may be sold at any tax sale for taxes or assessments due or to become due thereon, or to purchase any outstanding title acquired by any deed or tax certificate arising from any past or future tax sale of said premises, or any part thereof, on such terms as he may deem advisable, without notice to the said party of the first part, and the amount of money so paid shall, with interest at the rate of ten per cent. per annum in addition thereto, be added to the payment which shall next thereafter become due on said promissory note, and shall also constitute an additional indebtedness from the said party of the first part, which this deed is given to secure.

And it is stipulated and agreed that in case of default in any of said payments of principal or interest as aforesaid, or of a breach in any of the covenants or agreements herein contained, then and in that case the whole principal sum hereby secured, and the interest thereon, according to the tenor and effect of said promissory note, to the time of such sale, shall, at the option (without notice thereof to the said party of the first part, their heirs, assigns, or legal representatives) of the legal holder or holders of said promissory note become at once due and payable, and the
131 premises hereby conveyed may be sold in like manner and with the same effect as if the said indebtedness had fully matured. And it is further agreed by the parties hereto that on making sale as above provided for said party of the second part may sell the premises either in parcels or altogether, as he may see fit; that all the acts and trusts which he is by these presents empowered to perform and execute, he may per-

form and execute as well by attorney as in person, and that in case said party of the second part, either in person or by his attorney, shall hereafter execute any deed, conveyance, or instrument in writing which purports to be executed in pursuance of the provisions of this deed, such deed or instrument of writing shall be prima facie evidence that the same was properly and lawfully made by said party of the second part, in pursuance of the powers hereby granted, and the said party of the first part for themselves, their heirs, executors, administrators, and assigns further covenant and agree that until they shall well and truly pay or cause to be paid unto the said Hugh T. Dickey, or his legal representatives or assigns, the aforesaid sum of money, with interest thereon as aforesaid, at the time and in the manner specified in said promissory note, according to the true
132 intent and meaning thereof, they will keep the buildings standing on said premises insured against fire in a sum not less than seven thousand dollars ($7,000), and the policy or policies therefor assigned to said party of the second part, or his successor in trust, for the benefit of said Hugh T. Dickey and his legal representatives, and assigns, the company or companies in which such insurance is to be effected to be approved by said party of the second part or his successor in trust.

And the said George A. Sackett and Harriet W. Sackett, his wife, party of the first part, hereby expressly waive and release any and all right, benefit, privilege, advantage, and exemption under or by virtue of any and all statutes of *of* the State of Illinois providing for the exemption of homesteads from sale on execution or otherwise, and especially under the act entitled "An act to exempt homesteads from sale on execution," passed by the general assembly of the State of Illinois, A. D. 1851, and approved February 11, A. D. 1851, and an act entitled "An act to amend 'An act to exempt homesteads from sale on execution,'" passed by said assembly A. A. 1857, and approved February 17, 1857. And the said George
133 D. Sackett, for himself, his heirs, executors, and administrators, covenant and agree to and with the said party of the second part, his legal representatives or successors in trust, that at the time of the ensealing and delivery of these presents he is well seized of said premises in fee simple, and ha' good right, full power, and lawful authority to grant, bargain, and sell the same in manner and form aforesaid, and that the same are free and clear from all liens and incumbrances whatsoever (except as herein specified.) And it is further agreed, and especially understood, that in case of the death, resignation, removal from the said city of Chicago, or other inability to act of said party of the second part, then John Mattocks, of the said city of Chicago, shall be, and hereby is, appointed and made the successor in trust herein, with like power and authority as the said party of the second part, and the premises shall become vested in such new trustee accordingly. In witness whereof the said party of the first part have hereunto set their hands and seals and affixed the required stamp the day and year first above written.

GEORGE A. SACKETT. [L. S.]
HARRIET W. SACKETT. [L. S.]

Signed, sealed, and delivered in the presence of.

[2 United States 2. Two dollars. Conveyance. 2 Inter. revenue 2. G. A. S. May 12, '70. 2 United States 2. Two dollars. Conveyance. 2 Inter. revenue 2. G. A. S. May 12, '70. U. S. inter. revenue. Five dollars. Conveyance. 5 Fi 5 ve. 5. G. A. S. May 12, '70.]

134 STATE OF ILLINOIS,
County of Kane, town of Elgin, ss:

I, Pindar F. Ward, a notary public for the town of Geneva, in said county, in the State aforesaid, do hereby certify that George A. Sackett and Harriet W. Sackett, his wife, who are personally known to me to be the same persons whose names are subscribed to the foregoing deed as having executed the same, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the same instrument of writing as their free and voluntary act, for the uses and purposes therein set forth, and thereby conveyed all their right, title, and interest in and to the premises described in said deed, and expressly waived and released all right, claim, benefit, privilege, advantage, and exemption under any and all "homestead exemption laws," so called, of the State of Illinois; and the said Harriet W. Sackett, wife of the said George A. Sackett, having been by me examined separate and apart, and out of the hearing of her husband, and the contents and meaning of the said deed, and also her rights and benefits under the "homestead exemption
135 laws," so called, of the State of Illinois having been by me made known and fully explained to her, acknowledged that she had freely and voluntarily executed the same, and relinquished all her dower, and right, title, and interest in and to the lands and tenements therein mentioned, and expressly waived and released all right, claim, benefit, privilege, advantage, and exemption under any and all "homestead exemption laws," so called, of the State of Illinois, without the compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and notarial seal this seventeenth day of May, in the year of our Lord one thousand eight hundred and seventy.

[NOTARIAL SEAL.] P. F. WARD,
Notary Public.

(Endorsed:) Deed of trust. George A. Sackett and wife to John De Koven for use of Hugh T. Dickey. No. 53577. Filed for record in the recorder's office of Cook County, May 23, A. D. 1870, and recorded in book 593 of , page 27.

NORMAN GASSETT,
Recorder.

136 $9,000.00.] CHICAGO, ILL., *May 12th*, 1870.

Three years after date I promise to pay to the order of Hugh T. Dickey nine thousand and $\frac{00}{100}$ dollars, at his office, in the city of Chicago, value received, with interest after maturity at the rate of ten per cent. per annum.

GEORGE A. SACKET.

Due May 12, 1873.

(On margin:) Secured by trust-deed duly stamped.

(Endorsed on back:)

By agreement this note is extended for five years from this date, with interest at the rate of nine per cent. (9 %) per annum, for which three interest notes have been given.

Chicago, May 12, '73.

HUGH T. DICKEY,
J. DE K.
GEORGE A. SACKETT.

137 $405 #.] CHICAGO, *Nov.* 12, 1872.

May 12th, 1877, after date I promise to pay to the order of Hugh T. Dickey, four hundred & five dollars, at his office, in Chicago, with 10 % int. after due, value received, being for interest then due on my note for $9,000, dated May 12, '70, which has been extended for five years.

No. . Due .

GEORGE A. SACKETT.

(Across the face:) Iowa National Bank. No. 4450. Des Moines.

(Endorsed on back:)

HUGH T. DICKEY,
By JOHN DE KOVEN,
His Att'y.

$405 #.] CHICAGO, *Nov.* 12, 1872.

Nov. 12th, 1877, after date I promise to pay to the order of Hugh T. Dickey, four hundred and five dollars, at his office, in Chicago, with 10 % int. after due, value received, being for interest then due on my note for $9,000, dated May 12, '70, which has been extended for five years.

No. . Due .

GEORGE A. SACKETT.

$405 #.] CHICAGO, *Nov.* 12, 1872.

May 12th, 1878, after date I promise to pay to the order of Hugh T. Dickey, four hundred & five dollars, at his office, in Chicago, with interest after due @ 10 %, value received, being for interest then due on my note for $9,000, dated May 12, '70, which has been extended for five years.

No. . Due .

GEORGE A. SACKETT.

138 In the circuit court of the United States for the northern district of Illinois.

JOHN A. ELLIOTT, COMPLAINANT,
vs.
GEORGE A. SACKETT ET AL. DEFENDANTS. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court.

THURSDAY, *the 10th day of October, A. D.* 1878.

Present, W. E. Mason, esq., complainant's solicitor, and E. G. Mason, esq., defendants' solicitor.

WALTER MATTOCKS, a witness on behalf of the defendant Dickey, being first duly sworn, was examined in chief by Mr. E. G. MASON, and deposes and says as follows:

Q. In this computation is an amount due for taxes, $697.92. Do you know of the payment of the amount of taxes shown in this computation?

A. Yes, sir; I made the payment.

Q. You made the payment on behalf of Judge Dickey?
A. Yes, sir.
Q. When?
A. On the 22nd of August, 1878.
(Signature waived by agreement of counsel.)

139 In the circuit court of the United States for the northern district of Illinois. In chancery.

JOHN A. ELLIOTT
vs.
GEORGE A. SACKETT ET AL. } Bill.

and

HUGH T. DICKEY
vs.
GEORGE A. SACKETT ET AL. } Cross-bill.

Testimonytaken before Henry W. Bishop, master in chancery of said court.

THURSDAY, *the 10th day of October, A. D.* 1878.

Present, W. E. Mason, esq., solicitor for complainant, and E. G. Mason, esq., solicitor for defendant.

JOHN W. ULM, a witness on behalf of the complainant, being first duly sworn, was examined in chief by Mr. W. E. MASON, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. John W. Ulm; Chicago, Cook County, Illinois; business, a broker.

Q. Do you know Mr. Elliott, the complainant in this case, and Mr. Hill, and Mr. Sackett?

140 A. I know Mr. Elliott, and I know Mr. Hill. I have seen Mr. Sackett only a few times.

Q. At the time this trade was consummated, which has been testified to by Mr. Elliott here to-day in your presence, where was your office in this city, and where was Mr. Elliott's office?
A. 162 Washington street.
Q. Did you office together?
A. Yes, sir; the same room.
Q. Were you in partnership in any way?
A. No, sir; we shared desk and office expenses together; no regular partnership.
Q. Do you recollect distinctly of ever hearing any conversation between Mr. Hill and Mr. Elliott, previous to the execution of this contract for the purchase of the property in controversy?
(Objected to by the defendant Dickey as incompetent.)
A. I recollect of Mr. Hill coming in with the contract; the contract I did not see, but the conversation turned on the subject of assuming the incumbrance described in that contract which Mr. Elliott refused to sign.
Q. What did Mr. Hill do with that contract?

A. That I do not know; he left the office.

Q. But you say that he had the contract, and it was for this property, you understood by the conversation; he brought it with him, did he?

141 A. Yes, sir; I understood the contract to cover this property from the conversation.

(The testimony of the witness as to the contents of the contract objected to on the grounds that the contract is the best evidence.)

Q. Do you know where the contract is that Mr. Elliott refused to sign?

A. No, sir.

Q. Have you ever seen it since?

A. No, sir.

Q. Afterwards did Mr. Elliott execute a contract in regard to that property, if you know of your own knowledge?

A. I only know from seeing the contract here and hearing him talk in regard to it.

Q. Who did Mr. Hill represent in that trade, if you know?

A. I suppose that he represented Mr. Sackett; I so understood just from the conversation.

Q. Did you understand that from the conversations of Mr. Hill and Mr. Elliott there together?

A. From the conversation they had there together in the room, I so understood it.

Q. Now, why did Mr. Elliott refuse to sign that first contract brought in there by Mr. Hill?

142 A. I understood from the fact that it was not explicit in regard to the incumbrances; he wanted to have it "subject to," and not use the word "assume."

Q. Were you pretty well acquainted with Mr. Elliott and his trades made by him?

A. We were in the office there.

Q. Talked his trades to you freely, did he?

A. I cannot say that he talked them freely; he talked them frequently.

Q. Now, what was his business rule in regard to assuming incumbrances, if he had any, to your knowledge?

(Objected to as irrelevant and immaterial.)

A. As far as I knew, it was invariably to take incumbrances "subject to" and not "assume" them; we discussed that question quite frequently between us whether we would have any liabilities taking them "subject to" when the word "assume" was not used; we submitted it to several legal minds and talked it around.

(The conversations between the witness and Elliott are objected to as incompetent and irrelevant.)

Q. Did Mr. Elliott not tell Mr. Hill, at the time that he came in there, that he would not assume any incumbrances for any one?

143 (Objected to as leading.)

Q. State what he told Mr. Hill, or the substance of what he told him.

A. All that he said I do not know, but that was the principal thing in controversy—the assumption of the incumbrances, which he refused to do.

Q. What did Mr. Elliott say?

A. He refused to do it, and said he would not.

Q. Do what?
A. Assume it.
Q. Assume what?
A. The encumbrances.
Q. What did Mr. Hill say, if you recollect?
A. I do not recollect what Mr. Hill said in that conversation. It was more about their business between them; I know they kind of flared up just at that time, and it attracted my attention; I was not interested in the trade.
Q. You sat facing each other?
A. Sat facing each other on that occasion.
Q. Mr. Elliott and Mr. Hill; where were they?
A. They were on the other side; Mr. Hill was at the corner of the table and Mr. Elliott in front.
Q. What was the condition of Mr. Elliott's health at that time?
144 A. His health from the time that he came here, during the time that he stayed here, most of the time was in very bad condition, as I understood.
Q. How did he appear in the office?
A. Well, a good deal as he appears to-day.
Q. State how that appearance was.
A. He was nervous, had a headache, and rush of blood to the head, and an inability for doing anything or holding a conversation.
Q. Absent minded?
(Objected to.)
A. Yes, sir; quite much so; there was a want of concentration to the mind quite frequently; it was a frequent occurrence.
Q. Have you any interest in this suit, Mr. Ulm?
A. None at all.
Q. Do you recollect taking a deed to be recorded for Mr. Elliott shortly afterwards?
A. I recollect taking a deed a short time before he left the city to the recorder's office for record; Mr. Elliott came in complaining of being unwell, and wished I would take it for him to be recorded.
Q. And you took it to the recorder's office?
145 A. Yes, sir.
Q. Was that the deed, do you remember?
A. Well, sir, I could not be positive whether that was this deed or some other deed.
Q. Is that your recollection?
A. My recollection is that it was this deed; but to be positive, I will not.
Q. Do you know of his getting any other deed for any property in this county about this time?
A. No, sir; I do not.
Q. Is it your recollection that he did not get any other property about that time?
A. Well, he might have got it, but not to my knowledge.

Cross-examination by Mr. E. G. MASON:

Q. How long did you and Mr. Elliott have offices together?
A. About a year.

Q. Do you remember from what time to what time?

A. Nearly a year, from the 1st of March to the 1st of March.

Q. 1875 to 1876?

A. Yes, sir; it might have been a little longer, and it might have been a little shorter.

Q. How much of the time was Mr. Elliott at the office?

146 A. I should say—do you mean in days?

Q. Yes, sir; how many day'—what part of the business days during that period was he at the office?

A. He would be there a majority of the time; very late about coming down, and very early about going home as a rule, depending on the condition of his health.

Q. When you testified as to Mr. Elliott having a headache, rush of blood, etc., I suppose you testified from what he told you?

A. And from what I can see; about the rush of blood, I did not see that.

Q. You are not a medical man?

A. No, sir.

Q. You never have studied medicine or practiced it?

A. No, sir.

Q. Do you mean to be understood that these symptons and appearances characterized Mr. Elliott during all that year?

A. Not during all the time; they were occasional, periodical. I wont say periodical absolutely, but occasional.

Q. Did you ever see Mr. Sackett?

A. I saw Mr. Sackett once before that I recollect of. I may have seen him a good many times?

147 Q. I mean in connection with this transaction; was he ever at the office?

A. He was either at the office about the time they closed up or one time after. I know that he and Mr. Elliott had a little conversation about a note. It may have been when it came due.

Q. You don't remember of his being there more than once?

A. That is all the time that I now recollect of him being there.

JOHN W. ULM.

Subscribed and sworn to before me this 24th December, 1878.

HENRY W. BISHOP,

Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

148 In the circuit court of the United States for the northern district of Illinois. In chancery.

JOHN A. ELLIOTT
vs.
GEORGE A. SACKETT ET AL. } Bill.

and

HUGH T. DICKEY
vs.
GEORGE A. SACKETT ET AL. } Cross-bill.

Testimony taken before Henry W. Bishop, master in chancery of said court.

THURSDAY *the 10th day of October, A. D.* 1878.

Present, W. E. Mason, esq., solicitor for complainant, and E. G. Mason, esq., solicitor for defendant.

JOHN A. ELLIOTT, a witness on behalf of the complainant being first duly sworn, was examiued in chief by Mr. W. E. MASON, and deposes and says as follows:

Int. 1. Please state your name, age, residence and occupation.

Ans. John A. Elliott; residence, Des Moines, Iowa.

Q. What has been your business for the last fifteen or twenty years?

149 A. I have been auditor of the State of Iowa for six years. I have been land commissioner for the Des Moines Valley Railroad Company, vice-president and cashier of the Citizens' National Bank at Des Moines, and I am now president of the State Insurance Company.

Q. During that time have you resided in Chicago?

A. During that time, for two or three years, I have been out of business. I was affected with pressure on the brain so that I had to quit all business.

Q. What year was that?

A. In 1874, and a portion of 1875.

Q. When did you come to Chicago, and during what time were you here?

A. I came to Chicago in March, 1875. I remained here a year.

Q. Do you know Mr. Hill and Mr. Sackett, the defendants in this suit?

A. I do.

Q. Do you know Mr. Dickey, the complainant in the cross-bill?

A. No, I do not.

Q. Did you ever have any business relation with him?

A. No, sir; not any.

Q. Do you recollect the time and circumstances connected with

150 the making of this agreement for deeds between yourself and Mr. Sackett, the agreement being made Exhibit A to the original bill in this case?

A. Yes, sir.

Q. With whom did you have your consultations and arrangements as to this agreement?

(Counsel for the defendant Dickey objects to any parole testimony from the witness with regard to any agreement or deed in writing as inadmissible to contradict or vary the terms of such agreement or deed.)

A. You mean as to making the trade?

Q. Yes, sir; as to making this agreement.

A. With Mr. Hill?

Q. Did you ever talk with Mr. Sackett about it?

A. No, sir; the negotiations were all with Mr. Hill.

Q. Who did Mr. Hill represent in this?

(Objected to.)

A. Mr. Sackett.

Q. Did you pay Mr. Hill any commission?

A. No, sir.

. Was he in anywise employed to represent your interest?

A. Not at all.

Q. State whether os not Mr. Hill, at any time before the signing
151 of the contract, Exhibit A, made any other contract, and produced it for your signature. If so, state fully the circumstances in connection with it.

(Question objected to by the solicitor for the defendant Dickey on the same ground as before.)

A. Mr. Hill had offered this property to me, and wanted me to trade for it, some months before the contract was made, and asked me to assume the mortgage and incumbrances. I told him I never assumed an incumbrance, and would not trade for any property and assume any incumbrance. Along, I think, in January, he offered to trade me the equity—to trade it to me subject to the incumbrance. He made out the contract and brought it into our office, 162 Washington street, and, examining the contract, I noticed that he had written in "to assume the incumbrance." I said, "Mr. Hill, that was not our contract;" that he knew very well I would not assume that. I had told him so before frequently. Mr. Hill then put the contract in his pocket, and in a short time afterwards—a few days—
152 brought in another contract, in which I took the property as we had agreed upon, subject to this incumbrance, but I did not assume it in any form or shape.

Q. Is this the contract marked Exhibit A to the bill? (Indicating.)

A. Yes, sir; that is the contract.

(Counsel for the complainant in the original bill offers in evidence the contract identified by the witness, and asks that it be made Exhibit A to the deposition of Mr. Elliott, the complainant.

The defendant Dickey objects to the introduction of this agreement in evidence, on the ground that the deed from Sackett to Elliott, of the property in controversy, is the only evidence admissible as to the agreement between the parties, as against said defendant.)

Q. Did you have any business rule in your trades in this city, in regard to assuming the incumbrance; and, if so, what were they?

(Question objected to as irrelevant and immaterial.)

A. I had. I had fully determined never to assume an incumbrance.

Q. Did you ever assume the incumbrance in this suit?

153 A. No, sir.

Q. How long was it, if you remember, after Mr. Hill presented you the contract for your signature, in which you agreed to assume and which you refused to sign, or declined to sign, was it that he presented you this article of agreement?

A. I do not remember distinctly. It was a few days.

Q. At the time he presented that agreement, which you declined to sign, was it or not signed by Mr. Sackett, if you remember?

A. Yes, sir; it was signed by Mr. Sackett.

(The defendant Dickey objects to any testimony as to the contents of the agreement, because the agreement itself is the best evidence.)

Q. Now, Mr. Elliott, how long after the execution of the contract Exhibit A, did you receive the deed from Mr. Sackett?

A. Well, it was some three or four weeks. I do not remember the dates exactly; it took some time to abstract it.

Q. Is that the deed that you received? (Indicating.)

A. Yes, sir; that is the deed.

(Counsel for the complainant in the original bill offers in evi-
154 dence the original deed from the defendant Sackett to complainant Elliott, which was filed for record in the recorder's office of Cook County, on the 10th day of March, A. D. 1876, and recorded in volume 458 of records, at page 445.)

Q. Do you remember, at the time you received this deed, who gave it to you?

A. Mr. Sackett.

Q. Where were you, if you remember?

A. In Mr. Hill's office.

Q. What was your condition at the time, physically?

A. I was very unwell at that time.

Q. What particular trouble were you laboring under?

A. Well, I was laboring under what was called a pressure of the brain.

Q. Did you take treatment for it at that time?

A. Yes, sir; I was taking electric baths.

Q. Did you read this deed when it was given to you, and examine it closely?

A. No, sir; I did not read it all. I read it far enough to show that it was the property on Calumet avenue, and that it was subject to the mortgage or incumbrance.

Q. Did you read that part of the deed which says that you "as-
155 sume and agree to pay," as a part of the consideration for this property?

A. No, sir; I did not, or I would never have received it.

Q. Was that in accordance with your understanding and agreement with Mr. Hill?

A. Not at all; I had refused the contract on that very ground.

(Testimony objected to by the defendant Dickey for the reasons given above.)

Q. Did you record this deed?

A. No, sir; I went to the office and asked Mr. Ulm to take it around.

Q. Did you or not have frequent talks with Mr. Hill in regard to this question of assumption?

A. Yes, sir; several times.

(Testimony objected to by the defendant Dickey, for the reasons given above, as inadmissible against him.)

Q. Did you ever, at any time, agree to assume this incumbrance?

A. I never did; I never gave him the least encouragement to think I would.

Q. What did you trade Mr. Sackett for this property?

A. I gave Mr. Sackett 120 acres in Palo Alto County, Iowa, and three lots in South Evanston that were encumbered by a mortgage of
156 $1,750, and one lot in, I think they call it, Grant's addition to South Evanston. That lot was clear; that is, there was no encumbrance on it.

Q. Now, what was the actual value of that which you say you traded to Mr. Sackett for the equity in this property?

(All testimony as to this property is objected to by the defendant Dickey as inadmissible and irrelevant.)

A. Do you mean the trading price or the cash value—actual cash value?

Q. I would like the actual cash value.

(Testimony objected to, as it is not shown that the witness is competent to show the value of real estate.)

Q. If you know?

A. I reckon it about three hundred and ninety dollars, the actual cash value.

Q. Are you familiar with the price of lands in the state of Iowa?

A. Yes, sir.

Q. Had you been accustomed to trading there for some years?

A. Yes, sir.

Q. Are you familiar with the prices of lands and lots such as you sold him, and had you been for some time?

A. Yes, sir.

Q. How long experience had you had in trading generally?

A. In real estate?

157 Q. Yes, sir.

A. Oh, I have been dealing in real estate more or less for twenty-five years.

Q. What, in your judgment, is the actual cash value of what you traded him—what was it at that time?

A. Three hundred and ninety dollars would be a fair estimate for cash.

Q. Did you know the value, or about the value, of this property down on Prairie avenue which you bought?

A. Well, I thought I did.

Q. Had you bought other property in that neighborhood?

A. Yes, sir.

Q. More than one house?

A. Yes, sir; I had bought two houses, not far from there, on Prairie avenue.

Q. You lived near there, did you not?

A. I lived near the corner of Twenty-fourth and Prairie avenue.

Q. State whether or not you considered the property that you were getting of any actual value over and above the incumbrance.

A. I would not have taken the property and agree to pay the incumbrances, but I considered there was some trading value in it.

Q. In what, in the equity?

A. In the equity; yes, sir.

. Was any part of the property that you conveyed to Mr. Sackett encumbered?

158 A. Yes, sir; the lots in South Evanston.

Q. Did you, in making your deed to Mr. Sackett, draw the deeds in such a way that he assumed the incumbrance?

A. Oh, no.

(Objected to on the ground that the deed itself is the best evidence.

Counsel for complainant gives notice to Mr. Sackett to produce the original deed upon the hearing of the case; or before the time for the close of the proof, or in the event that he fails to produce it, that a certified

copy from the recorder's office of Cook County will be introduced in evidence in place thereof.)

Mr. W. E. MASON:

Q. Can you produce that deed, Mr. Sackett?

Mr. SACKETT. No, sir; I made a copy of it.

Mr. MASON. I mean the deed that Mr. Elliott conveyed to you.

Mr. SACKETT. Oh, no; I have not that. I did not think it was necessary.

Mr. W. E. MASON:

159 Q. You say that the consideration passing from you to Mr. Sackett for the equity in this property was in your opinion actually worth about three hundred and ninety dollars. State whether or not there was any consideration passing from Mr. Sackett to you whereby you should assume this incumbrance?

(Question objected to by the defendant Dickey, on the ground that the deed conclusively presumes the consideration.)

A. No, sir; not any. He paid me fifty dollars extra, but that was on account of the decline in the rent.

Q. After you had bought this property did you place it out for other people to sell?

A. I did.

Q. How did you order them to sell it?

A. To trade the equity the same as I had bought it.

Q. Well, how; subject to incumbrance?

(Objected to as irrelevant and inadmissable.)

A. Subject to the incumbrance.

Q. Can you remember any of those that you gave it to to trade subject to the incumbrance?

A. Mr. Boyd was one I believe; Thomas Boyd I believe his name is.

160 Q. Do you remember any others; the names of any others?

A. No, sir, I do not now, but I had considerable conversation with Boyd about the time I was trading, before I got the contract and before I got the deed. He got me an offer for it.

Q. The consideration recited in the contract, as I see, by the contract expressed, was placed at fifteen thousand dollars. Do I understand you to say, and is it correct, that the real consideration was simply a conveyance of the property described—the Iowa land and the Evanston lots?

A. Certainly.

Q. That was the only consideration which passed from you?

A. Yes, sir.

Q. That represented the fifteen thousand dollars—the nominal fifteen thousand dollars?

A. That represented the equity of the property I gave to him.

Cross-examination by Mr. E. G. MASON:

Q. Mr. Elliott, during what period were you auditor of the State of Iowa?

A. I was elected in 1864, and took my office, I believe, the first of January, 1865.

Q. From that time until 1871?

161 A. Yes, sir; six years, that was three terms.

Q. What were your duties in that office, briefly?

A. To examine and audit all accounts against the State of Iowa, and to draw drafts on the treasurer.

Q. During what period were you land commissioner of the Des Moines Valley Railroad?

A. Well, the last year I was in office I had their agency and held it for over two years; I do not know but it was three years.

Q. State briefly your duties in that office?

A. My duties were to appraise the lands and make sales of them.

Q. How large were the transactions?

A. They had some four hundred thousand acres of land. I sold a large portion of them.

Q. Can you tell about how much?

A. I could not exactly—over one half I should think. In that there were sales largely made to the bondholders—exchanging bonds for land.

Q. These lands were conveyed by deed, I suppose?

A. Yes, sir.

Q. Who drew these deeds?

A. The deeds were made by the trustees, Gilman, Cowdry & Co., of New York.

162 Q. Who prepared them for their signature? Who drew them up?

A. I think they generally made the deeds. I gave them a memorandum of the description of the lands and the amounts.

Q. Then were the deeds returned to you to be delivered to the parties?

A. Yes, sir; generally. That is, when the parties lived west. But in the State of New York they were delivered there.

Q. The deeds that were returned to you, were they examined and compared by you before you delivered them. Did you examine them to see if they were correct?

A. Yes, sir. I examined the descriptions.

Q. About what time did you become vice-president and cashier of the Citizens' National Bank?

A. In 1871, I believe it was.

Q. How long a time did you hold that office?

A. I held that of cashier till the fall of 1874, when I quit and went out of the bank. I went out in the spring; was not able to attend to any business. In the fall of 1874, I resigned my position there. I resigned the position of president of the State Insurance Company, and gave up business.

Q. When did you become president of the State Insurance Company?

163 A. I had held it then two years when I resigned.

Q. Your duties as vice-president and cashier of that bank were the ordinary duties, I suppose, of officers in those positions? It was a national bank, was it not?

A. Yes, sir.

Q. How large a capital?

A. One hundred thousand dollars.

Q. When did you resume the position of president of the State Insurance Company?

A. After I went back from Chicago. I was elected in January, 1877.

Q. During what period did you reside in Chicago?

A. From March, 1875, to March, 1876.

Q. Was it during that period—March, 1875, to March, 1876—that you purchased the two other houses which you speak of in Chicago, in the neighborhood of the Sackett property?

A. Yes, sir—no; I purchased one before I came here.

Q. When? About what time?

A. I could not tell you the date. It was a short time before that.

Q. When did you purchase the other?

A. I cannot remember the date now. It was while I was living here that year. I came here mostly for medical treatment; I was taking
164 electric baths; I have been everywhere, almost, for health—New York and Philadelphia, the sea shore, and out at the mountains, and these electric baths were the first things that gave me any help.

Q. What other business did you transact during the year you lived in Chicago, besides the purchase—you say you purchased one of these houses;

A. Well, I traded for some houses on the west side.

Q. Did you attend to the details of these trades yourself?

A. Yes, sir; most of them.

Q. Did you have any agent to do business for you during that year?

A. Well, I had an agent to sell properties for me.

Q. Real estate agent?

A. Yes, sir.

Q. Did you have an office in the city?

A. Yes, sir.

Q. Where was it?

A. I was at 123 Dearborn street and 162 Washington st.—that is part of the time on Dearborn street and part of the time on Washington street.

Q. How frequently were you at these offices?

A. Well, I always went down when I was able to go; there
165 were a great many days that I was unable to go.

Q. What business days of the year—how many that you were at your office, the year that you stayed here; about how many; what proportion; one-half the time, or less, or more?

A. I should think I was there half the time. I had never been confined to bed.

Q. Do you remember any other real estate transactions that you had during that year besides those you have mentioned?

A. Yes, sir; I traded for an equity in Evanston.

Q. Do you mean you bought the property?

A. I traded some other for it.

Q. You took the title to the Evanston property?

A. I think if I had been well, I would not have made either of the trades.

Q. When did you transact that Evanston trade; before or after the Sackett transaction?

A. It was the summer before. This Sackett trade was made just about the time I was giving up here, and going down to Des Moines. I found that the excitement here—I couldn't stand it.

Q. You went back to Des Moines, then, about March, 1876?

A. Yes, sir.

166 Q. When did you resume business there?

A. Well, I did not do any business until I was elected president of the insurance company in 1877.

Q. Did you buy property there when you went back, or did you already own property?

A. Yes, sir; I traded for property; I traded my house here for a house there.

Q. That was after you went back to Des Moines?

A. No, sir; before I went back I moved my household property to Des Moines.

Q. When was that trade arranged; what time?

A. I cannot remember exactly; it was during that winter some time.

Q. During the winter of 1875 and 1876?

A. Yes, sir.

Q. Can you tell how long it was before you went away?

A. I could not tell exactly how long. I got possession of the property there on the 15th of March.

Q. In Des Moines?

A. Yes, sir.

Q. The 15th of March, 1876?

A. Yes, sir.

Q. How did you first hear that that Sackett property was for sale?

167 A. Mr. Hill offered it to me the summer before—the summer of 1875. He spoke to me several times about it and then he wanted to trade it and have me assume. I refused and told him I would not assume anything. Along, I think, in January he offered to trade the equity.

Q. Did you go and look at the property yourself when Hill offered it to you?

A. Yes, sir; I did when he offered to trade me the equity.

Q. That you say was when?

A. I think it was in January.

Q. January, 1876?

A. Yes, sir; January, 1876.

Q. You went then and looked at the property?

A. Yes, sir.

Q. Then did you go and see Mr. Hill again after that and he came to see you?

A. I can hardly tell.

Q. Do you know how many meetings or separate negotiations you had; about how many with Hill about this property?

A. I could not tell. I met Mr. Hill about the equity and went along to see Mr. Sackett. I could not say how many.

Q. When did you first see Mr. Sackett?

168 A. Well, I could not say whether I saw Mr. Sackett the day before I got the deed or not. I do not remember now whether I met him before that or not.

Q. How do you know Mr. Hill represented Mr. Sackett?

A. He so represented to me that he acted for him.

Q. You say he did not represent you in any way?

A. No, sir.

Q. You did not pay him anything?

A. No, sir.

Q. You paid him nothing in connection with this transaction from first to last?

A. No, sir, not a dime; he received his pay from Mr. Sackett.

Q. You say you signed this agreement which has been offered in evidence, marked Exhibit A, three or four days before you got the deed?

A. I think it was that time; I could not say positively; you can tell by the deeds.

Q. Was it then signed by you at or about its date?

A. Oh, yes, sir.

Q. It is dated the 18th of February?

A. I told you Mr. Hill brought in one contract, which I refused, and then in about a few days he brought in this contract and presented it to me.

169 Q. When you met Mr. Sackett at Mr. Hill's office, did you have any conversation with him as to the contents of this deed?

A. No, sir; Mr. Sackett handed me the deed and I looked at it far enough to see that it gave the description and that it was subject to the mortgage; I did not assume the mortgage. Then came a lengthy description of the mortgage, which I did not take time to read. I supposed at that time that Mr. Hill had written that deed, and I knew that he promised to make the deed right. I was very unwell the morning I received that deed.

Q. What time in the day was it?

A. Well, I could not remember now. I was late of coming down—later than usual—on account of being unwell.

Q. About what time?

A. Well, I really could not tell you.

Q. Can you tell whether it was morning or afternoon?

A. If it was in the forenoon it must have been in the latter part.

Q. Did you go directly to Hill's office when you came down town that day?

A. That is my recollection, that I stepped into his office.

170 Q. Where was his office then?

A. It was on Dearborn street, near the corner of Madison, right below his present office, I believe.

Q. Did you go to your own office after this, on that day?

A. Yes, sir; I took the deed and gave it to Mr. Ulm, and asked him, as I was feeling unwell, to carry that over to the recorder's office. In justice to myself I ought to say there were times when my mind was as clear as anybod*ie*'s, and then at other times I would have such pressure on the brain that if a person was talking to me I would not know a word of what he said to me.

Q. According to the terms of the bargain, Mr. Sackett's property was called worth fifteen thousand dollars?

A. Yes, sir; that was the nominal price put on it.

Q. And the incumbrance of it you understood to be nine thousand dollars, as recited in this agreement?

A. Yes, sir.

Q. That left the nominal net value six thousand?

A. Yes, sir.

Q. Then what was the nominal or trading value put on the Evanston property?

171 A. Well, the property that I gave him represented about six thousand dollars.

Q. How was it divided between the Iowa lands and the Evanston property; what part of it did you figure?

A. I do not know that I could tell. Well, we always rated wild lands at ten dollars an acre, regular trading price.

Q. That would make the Iowa land in this trade called twelve hundred dollars, that is one hundred and twenty acres, and the Evanston property stood for the remainder?

A. Yes, sir.

Q. How long before this agreement was signed were these terms arranged or agreed upon—the terms of the trade—how long before the agreement was signed? This agreement was signed on the 18th of February.

A. Well, it was not long, because when we agreed on the terms then Mr. Hill made his first contract and had Mr. Sackett sign it. Mr. Sackett, as I understood, did not live in the city. I suppose the first opportunity he had, he had Mr. Sackett sign it, and brought it to me and I refused it. Then, a few days afterwards he brought me this (indicating).

Q. Well, before this one was signed you must have talked over

172 the values that you were going to put on the two sets of properties.

A. Mr. Hill and I did.

Q. Then how long before the agreement was signed did you come to an understanding upon that point as to the value that should be put upon the properties?

A. Oh, I can hardly say; we were trading along some little time backwards and forwards. My offer, as I remember now, was eighty acres of land in Iowa, then I raised it to one hundred and twenty, and he accepted that.

Q. How do you get at this three hundred and ninety dollars of cash value that you put on this six thousand of trading value?

A. Well, the land in Iowa I reckoned at two dollars an acre. It was pretty low ground; I would have taken two dollars for it. I have some more of the same kind I would sell to-day in the same county.

Q. When you got at this three hundred and ninety dollars cash value, it is at the basis of to-day's price, is it not?

A. No, sir; the cash price; you probably do not understand there is a very wide difference between the cash price and the trade price

173 of property in Chicago; you put on fabulous prices on everything.

Q. What I want to understand is whether you fix this three hundred and ninety dollars of cash value by the prices that prevailed two years ago, or by the prices that prevail to-day?

A. I fix it by what I was taking for it at that time.

Q. You say Mr. Sackett paid you fifty dollars in cash; when was that paid?

A. Well, it was in this trade.

Q. At the time you met him at Hill's office and got the deed?
A. Yes, sir.
Q. That was the time he paid you fifty dollars?
A. Yes, sir.
Q. Was that paid directly from Sackett to you?
A. I took Mr. Sackett's note for that and the interest. The interest was not due, and I took his note for that.
Q. How much was that note?
A. I do not remember now; there is a memorandum made about that time, $202.50 and $13.50—$216.00 interest—and $50.00 cash; $266.00, I believe it was. I do not remember the amount.
174 Q. There was an interest payment of $450 coming due the following May, was there not, or coming due after this trade?
A. Coming due after this trade, yes, sir. It had run part of the time.
Q. And you figured what Mr. Sackett's part of it would be up to the day the deed passed?
A. Yes, sir, he was to give it to me free of interest up to that date.
Q. And you took his note for his part of the interest, and for $50 cash payment?
A. I think so, I think he paid me a portion of it at that time; I do not remember distinctly how that was.
Q. But all that he did not pay of these two items he gave a note for?
A. Yes, sir.
Q. Was that note afterwards paid?
A. Well, it was compromised.
Q. And surrendered by you?
A. Yes, sir, I could not collect the money on it.
Q. Who do you say put that deed on record?
A. Mr. Ulm took it to the recorder's office.
Q. For you?
A. Yes, sir.
Q. When did you get it again from record?
175 A. I could not say positively.
Q. Well, about what time?
A. I really could not say, within a month.
Q. Well, give it as near as you can?
A. My recollection is that I got it out after I moved my family to Iowa I came back a short time afterwards.
Q. About what time would that be; you say you moved your family to Iowa, on the 15th of March, 1876?
A. Yes, sir.
Q. About how long afterwards did you come back to Chicago?
A. Well, I think it must have been in the middle of April.
Q. Did you get the deed yourself from the recorders office?
A. I believe so, I got several papers that belonged to me there at that time.
Q. Has it been in your custody since—in your possession up to the time of commencing this suit?
A. Yes, sir, I never read it or looked at it, though, until a short time before I brought the suit.
Q. Did you see Mr. Sackett at any time after you received the deed from him?

A. Before I discovered the mistake?

176 Q. I will say after the closing of the trade between you and him, did you see Mr. Sackett at all?

A. I think I did.

Q. More than once?

A. I do not remember—oh, yes, I saw him afterwards.

Q. After you came back from Des Moines, at that time?

A. I do not remember seeing him after that; I left my business with Mr. Mason.

Q. Did you ever see Mr. Sackett with regard to this note of his?

A. I believe I left that with Mr. Mason.

Q. You remember seeing him after the trade was closed?

A. Yes, sir; I met him on the street.

Q. Did you ever call his attention to anything that you thought was wrong about this deed?

A. I did not know there was anything wrong at that time.

Q. Then you did not call his attention to it, of course.

A. Of course not; as soon as I discovered it I came down here.

Q. When do you say you first descovered that the deed provided for your assuming this mortgage or incumbrance?

177 A. I do not remember the date. It was a short time before I made application to Mr. Mason and consulted with him. I came down here on purpose.

Q. How long was that before the filing of the bill in the case and the commencement of the suit?

A. Well, I could not tell you; I do not know when the suit was commenced; all I did was to consult Mr. Mason.

Q. Where were you when you discovered the mistake that you claim to be in the deed?

A. At home in Des Moines. I was writing up my papers, and I had them all in a miscellaneous way, and was writing them up and looking them over and filing them away. I looked over this deed, and never was so surprised in my life as when I saw that stuck in at the end there.

Q. Can you fix about the time of that discovery?

A. Well, I say it was a short time before I came here to consult Mr. Mason, and start this suit.

Q. Can you fix it with regard to the time of commencing this suit? The suit was commenced on April 28th, 1877.

178 A. I could not tell within two weeks.

Q. Was it in 1876 or 1877 that you saw him?

A. Oh, it was in 1877, a short time before I came down here and consulted with him. I suppose he started the suit.

Q. Can you tell whether you were here in January, February, March, or April of that year, 1877?

A. Well, I was here a number of times.

Q. As near as you can place it, it was some time in 1877?

A. Yes, sir.

Q. You came over here immediately after you discovered the mistake that you claim to exist in the deed?

A. Yes, sir; a very short time afterwards.

Q. Well, cannot you fix the month by probability?

A. That is the nearest date that I have got. I came down in a very few days after making the discovery, and consulted Mr. Mason, and he made out his papers. Of course, the deed and these papers will give it as near as I can.

Q. You cannot remember now the time of the discovery or the time of your coming here to consult him?

179 A. Yes, sir. I say it was just a short time previous to consulting Mr. Mason and starting the suit.

Redirect examination by Mr. E. G. MASON:

Q. Did you get any other deed from any one conveying property in this county anywhere near this time except the Sackett deed?

A. No, sir.

Q. Counsel has asked you how and when you discovered this deed from Sackett to you contained a clause of assumption. Please state what, if any, effect that had upon you at the time you discovered that the deed provided you should assume the incumbrance of $9,000, if you recollect the effect.

A. Yes, sir; I recollect it distinctly. Do you wish me to state the circumstances?

Q. Yes, sir.

A. I was in our sitting-room, looking over some papers, sorting them out, and when I made that discovery, I came very near fainting. My wife and daughter helped me out on the porch. It was some time before I recovered.

JNO. A. ELLIOTT.

180 Subscribed and sworn to before me this 24th day of October, 1878.

H. W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

In the circuit court of the United States for the northern district of Illinois.

JOHN A. ELLIOTT, COMPLAINANT,
vs.
GEORGE A. SACKETT ET AL., DEFENDANTS. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court.

FRIDAY, *the 11th day of October, A. D.* 1878.

Present, W. E. Mason, esq., complainant's solicitor, and E. G. Mason, esq., defendants' solicitor.

HENRY L. HILL, a witness on behalf of the complainant, being first duly sworn, was examined in chief by Mr. W. E. MASON, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

181 Ans. My name is Henry L. Hill; my residence is Chicago; my occupation is real estate and loans; I am of lawful age.

Q. How long have you been a resident of Chicago, and how long engaged in your present business?

A. I have been a resident here since 1854—that would be about twenty-four years, I believe. My present business I have given you. I have been in that business since before the fire—some eight years and more.

Q. Do you know Mr. John A. Elliott, the complainant in this case?

A. Yes, sir.

Q. Do you know Mr. Sackett, the defendant?

A. Yes, sir.

Q. In February, 1876, do you remember of conducting a trade between those two gentlemen?

A. I negotiated a trade between them; February 18th is the date on my book—1876.

Q. (Counsel for complainant Elliott exhibits to the witness the contract marked Exhibit A to the deposition of John A. Elliott.) Examine that contract, and state in whose handwriting it is.

A. It is my handwriting.

182 Q. Who did you represent in that trade?

A. Mr. Sackett.

Q. Did you in any way, shape, or manner represent Mr. Elliott or receive any pay from him?

A. No, sir.

Q. At the time Mr. Sackett gave you that property to trade, or at any time after that, and up to the time you made that agreement, state whether or not Mr. Sackett, to your knowledge and recollection, instructed you to trade the property therein described as belonging to Mr. Sackett, in such a manner that the party buying should assume the encumbrance.

A. I do not recollect. He gave me the amount of the encumbrance and I was to trade it with that upon it. I was trading his—selling his equity or trading it.

Q. Did he give you instructions or not that the party whom you traded to should assume that encumbrance?

A. I don't recollect that. He gave me the amount of the encumbrance. I do not remember any specific instructions about it.

Q. Was that the first contract you drew?

A. No, sir; I drew another, which was objected to by Mr. Elliott.

183 Q. Did you present it to Mr. Elliott for his signature?

(Defendant Dickey objects to any testimony as to any contract except that furnished by the contract itself.)

A. Yes, sir.

Q. Can you produce the other contract?

A. No, sir; I don't know as I can; I do not think it was preserved.

Q. You say Mr. Elliott refused to sign that contract?

A. Yes, sir.

Q. What reason did he assign for refusing to sign that?

(Objected to as incompetent.)

A. On account of the assumption of the liability.

Q. Did the first contract you presented him state in terms that he was to assume that encumbrance?

A. I think it did.

Q. And he refused it on that account?

(Objected to.)

A. Yes, sir.

Q. What did you then do?

A. I wrote this contract and made it subject. He bought the property subject to the encumbrance, instead of assumed it; he bought it subject to it, as this contract specifies.

184 Q. What was the real consideration passing from Mr. Elliott to Mr. Sackett?

A. I don't know what the considerations in his deeds were. It was for the difference, I suppose; I don't know.

(Objected to.)

Q. Do you recollect what Mr. Elliott conveyed to Mr. Sackett?

(Objected to as secondary evidence. Question withdrawn.)

Q. State whether or not Mr. Elliott, after he purchased this property, instructed you to trade it, trade off his equity?

(Objected to as incompetent and irrelevant.)

A. He did; I had it to sell or trade, both or either.

Q. Did Mr. Elliott instruct you in trading that, to ask any one to assume the encumbrance?

(Objected to.)

A. He did not instruct me as I know of; I was simply trading the equity; I was not instructed in reference to——

Q. Did you ever see the deed that Mr. Sackett drew and gave to Mr. Elliott?

A. I saw the deeds when they passed between the parties.

185 Q. (Counsel for complainant exhibits to the witness Exhibit D to the deposition of John A. Elliott, being the original deed from Sackett to Elliott.) State whether you drew that deed.

A. No, sir; I did not.

Q. Who did, if you know?

(Objected to.)

A. I do not know; but I think it is Mr. Sackett's handwriting; I do not know who drew the deed.

Q. Did you ever read that deed before it was given?

A. No, sir; not as I recollect.

Q. Do you know whether Mr. Sackett had that contract with him at the time he drew the deed?

A. I do not know anything about it; I don't know when he drew it; they came into my office; each had their own deeds and made them and examined them in my office; I did not make the deeds on either side.

Cross-examination by E. G. MASON, Esq.:

Q. Your business is that of a real estate broker?

A. Yes, sir.

186 Q. Did you receive this property from Mr. Sackett in any different way from what you received property from other people?

A. Not that I am aware of.

Q. You acted simply with regard to that as with regard to other pieces of property.

A. Yes, sir.

Q. As a real estate broker?

A. Yes, sir.

Q. But Mr. Sackett paid you your commission?

A. I got his note for it. I wish he would pay it—part of it.

Q. He paid you part, and part he has not paid?

A. He paid me part, and part he has not paid.

Q. Mr. Hill, at the time of the exchange of the deeds between Elliott and Sackett what appeared to be Mr. Elliott's condition as to health?

A. About as it had been; I did not notice any special difference.

Q. Well, how had it been before that when you saw him? Was it the appearance of a man competent to transact business or not?

A. I judged so.

Q. That he was competent to transact business?

A. I judged him as competent. He said he was troubled with some weakness or something.

187 Q. You saw no reason at that time to doubt his competency to transact business?

A. No more than at other times.

Q. Do you remember Mr. Elliott's taking the deed from Mr. Sackett?

A. They were exchanged in my office; Mr. Elliott took his deed and Mr. Sackett took his.

Q. Do you remember whether they read the deeds mutually—the deeds that they received?

A. Well, I don't know; I guess they looked at them some. Whether they read them through or not I don't know.

Q. But they had them there and examined them?

A. They had them there, and each took his own deed.

Q. How long were they at your office at that time?

A. Oh, I could not tell.

Q. About how long?

A. They might have been there an hour or half an hour, and might have been longer or shorter; I could not say.

Q. Do you remember any negotiation or arrangement at that time as to the interest on the encumbrance on the property that Sackett deeded to Elliott?

A. I don't know as I know what you mean.

188 Q. Well, was there or not any computation made as to the interest which Sackett was to pay or the interest which Elliott was to pay?

A. I presume there was; that matter was figured upon, I presume.

Q. But you don't remember positively about that?

A. Well, it was at some time between them, because this trade dated from a certain date, and the interest figured from another date; and there was some interest computation made between the parties. I don't know whether it was then—I think it was then. I would not be positive.

Q. To show what share each was to pay?

A. Well, of course, they had to arrive at a point as to that.

Q. You had this same property in your hands as a broker afterwards, to trade or sell for Mr. Elliott?

A. Yes, sir.

Q. Did you have any other property of his?

A. Elliott's?

Q. Yes, Elliott's, for sale.

A. Yes, sir.

Q. How much; what other property?

A. I had some land in Iowa, some farm lands, and some wild lands.

189 Q. When was that property put into your hands by Mr. Elliott to sell—that Iowa property?

A. Well, I could not recollect when.

Q. Was it before or after the date of this transaction?

A. Oh, I think it was something before, and after, too, perhaps.

Q. This property, of course, you did not have for Mr. Elliott until after he had got a title to it?

A. Not until he had got it.

Q. Did you have any other city property of his to trade or sell for him?

A. I think I had this property at Evanston before; I think he had given me a memorandum of some property, but I cannot really tell now which.

Q. After you received this property from Mr. Sackett, did you go to Mr. Elliott with it, or did he come to you?

A. After I received Mr. Sackett's property?

Q. Yes, sir.

A. I went to Mr. Elliott, and tried to sell it to him several times, or trade it to him.

190 Q. Well, at the time you received it from Mr. Sackett, did you have this Evanston property of Mr. Elliott in charge?

A. I could not tell without referring to my books.

Q. What is your best recollection about it?

A. When I received it first of Sackett?

Q. Yes, sir.

A. Oh, I did not have it then; no, sir. I had had Mr. Sackett's property a good while and offered him several trades, which he rejected.

Q. At the time you went to Mr. Elliott to call his attention to this property of Sackett's, did you have Elliott's Evanston property in your hands for sale then?

A. I don't know whether I did or not. I could not state.

Q. But you think you had it before the sale was closed.

A. Why, of course, it was put into the trade. I had it then, if I didn't before.

Q. Well, did you have it before this trade was talked of?

A. Well, it was predicated upon this property; this trade was made upon this Evanston property; whether I had it before that time, I really could not state.

Q. Did you sell any other property for Mr. Elliott located in this city?

191 A. I believe I did.

Q. What was it?

A. Before, do you mean, or after?

Q. At any time?

A. I sold some property on the west side for Mr. Elliott; I believe those houses—traded them rather, traded his equity.

Q. Do you know when that was done, Mr. Hill?

A. I could not state whether it was after this or before.

Q. Was it during the year that Mr. Elliott resided in Chicago?

A. It was when he resided here that he made the trade; yes, sir. If it was not when he resided here it was soon after. I am not quite positive, but it was made after he went back to Iowa. It might have been that those houses that I sold for him were traded after he came back. I could not recollect without my books. Come to think of , I recollect that Mr. Elliott went back to Iowa and I wrote him in reference to this other trade, and he came in here and made it.

Q. This west side property?

A. Yes, sir.

Q. That was just after he went back to Iowa?

192 A. Well, it was not a great while after; it might have been a month or six weeks, or two months, or somewhere, I should say, in that neighborhood.

Q. That was the west side property?

A. Yes, sir.

Q. Well, then, you must have had it in your hands when you wrote to him, did you not?

A. Yes, sir.

Q. When did he put it in your hands?

A. I could not really tell without referring to my books.

Q. Give your best recollection as to whether it was before or after the Sackett trade?

A. I could not really say whether it was before or after. It is my impression, though, it was after.

Q. How long have you known Mr. Elliott?

A. Well, I knew him not long previous to this transaction; some time in the year of that transaction; that was 1876, along previous to that time I think a few months; I could not state just to the month.

Q. You were acquainted with him before you had the Sackett property put in your hands to sell, were you not?

A. Yes, sir.

193 (Counsel for complainant objects to any and all evidence as to the witness having in his hands any property belonging to Mr. Elliott for sale, as incompetent to establish any agency between the complainant, Mr. Elliott, and the witness, so far as the property in controversy is concerned.)

Q. How many times did you see Mr. Elliott before this Sackett trade was closed?

A. In reference to it?

Q. In reference to it?

A. To the purchase, or the original trade?

Q. Yes sir.

A. I saw him several times before I could get him to entertain this proposition.

Q. Where did you see him; at his office?

A. I saw him at different places. He lived down south, and I did, too. Used to see him quite often.

Q. What, in your opinion, was his condition as to bodily health at that time?

(Objected to, because witness is not shown to be a competent authority.)

A. Well, I didn't notice anything.

Redirect examination, by Mr. W. E. MASON:

194 Q. You knew that Mr. Elliott had been out of health for some time, didn't you?

A. I had heard so. I did not know anything about it myself any more than what I had heard.

Q. You never had any property, did you, in your possession or control, to trade for Mr. Elliott until he moved back to Iowa?

A. Before he went back to Iowa, he left me descriptions of several pieces of property.

Q. Was that shortly before he went back?

A. Yes, sir; the Iowa land.

Q. State whether or not it was after you had made this trade.

A. These houses on the west side he left with me before he went.

Q. Before the trade with Mr. Sackett?

A. I don't say that; no, sir.

Q. What is your best impression as to that?

A. Well, I think it was after. I think it was some time after.

Q. So that, as a matter of fact, you had no property of Mr. Elliott's in your hands to trade for him until after his trade with Mr. Sackett?

A. I do not think I did; that was about the first of our trading acquaintance.

195 Q. The first trade you made with him was one you made representing Mr. Sackett; this trade?

A. I think it was.

Recross-examination by Mr. E. G. MASON:

Q. Mr. Hill, let me call your attention to the Iowa land of Mr. Elliott. Did you or not have any of that in your hands to trade before the Sackett trade?

A. I don't think I did. I think that was subsequent.

Q. Do you remember how long after this deed was executed from Sackett to Elliott that Elliott returned to Iowa?

A. I don't recollect.

Q. Do you remember of having any interview with him between the time the Sackett deed was given him and the time he went to Iowa?

A. Oh, I have seen him a great many times.

Q. Well, I mean between those two dates?

A. Why, I have seen him, I say, several times after the Sackett deed before he went to Iowa—before he moved to Iowa.

Q. When did he move to Iowa, if you can tell?

196 A. I don't know.

Q. How long after?

A. After this trade?

Q. Yes, sir.

A. I really do not know. My impression was that he was here the best part of the year. I may have been mistaken in that.

W. E. MASON, Esq.:

Q. You don't mean to say, do you, that he was here the best part of the year—a year after the trade with Sackett?

A. I should think not. He was here some time before.

In the circuit court of the United States for the northern district of Illinois. In chancery.

JOHN A. ELLIOTT
vs.
GEORGE A. SACKETT ET AL. } Bill.

and

HUGH T. DICKEY
vs.
GEORGE A. SACKETT ET AL. } Cross-bill.

Testimony taken before Henry W. Bishop, master in chancery of said court.

FRIDAY, *the 11th day of October, A. D.* 1878.

Present, W. E. Mason, esq., solicitor for the complainant; E. G. Mason, solicitor for defendant Dickey.

G. C. SOMERS, a witness on behalf of the complainant, being first duly sworn, was examined in chief by Mr. W. E. MASON, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. My name is G. C. Somers; lawful age; residence, 121
198 Loomis st., Chicago. I am proprietor of the Turkish Bath Institute, at the Grand Pacific Hotel, and treat diseases generally.

Q. Just describe those baths.

A. I have Turkish baths—I suppose the gentlemen are familiar with them; a system of hot-air and manipulation, etc. And then I use electricity. I have made a study of electricity for thirteen years in its various forms.

Q. Do you know Mr. John A. Elliott, the complainant in this case?

A. Yes, sir; I do.

Q. You are not a regular practicing physician, I understood you.

A. No, sir; I am not.

Q. How long have you been in this business of baths?

A. Thirteen years, and very nearly fourteen.

Q. When did you first meet Mr. Elliott?

A. I should think it was in the spring of 1876; in the spring or winter, I am not certain. I made no memorandum of his case; I had no occasion to.

Q. How long did you treat him?

A. I should say about three months, off and on; perhaps longer.

Q. What treatment did you give him?

199 A. I used electricity with Mr. Elliott—treated him entirely with that.

Q. I wish you would state as near as you can, with your experience and education in that line, his condition. (No answer.)

(Defendant Dickey objects to the testimony of this witness, as he is not shown to be an expert in medical matters.)

Q. Did you ever study medicine?

A. Yes, sir; I have studied at Rush Medical College.

Q. How long?

A. I attended two courses besides studying elsewhere; still I am not a regular graduate.

Q. And you have made it your business specially, you say, for the last thirteen or fourteen years?

A. Yes, sir; in fact ever since I came out of the Army, and I had experience in the hospitals in the Army.

Q. What was Mr. Elliott's condition, so far as you can tell?

A. When Mr. Elliott came to me he was suffering with cerebral congestion. I do not think, sir, at that time that there was any breaking down of the brain structure; if there was it was very slight; I do not think
200 there was, though he was in a fair way to have such a condition take place. He suffered at that time with pressure in the brain, both at the base of the brain and on top of the head; with neuralgic pains, extending over the left temple, and with dizziness, especially so on rising or if anything disturbed him; he had dullness, especially after meals; fullness in the head, particularly after meals; a tendency to the accumulation of gas, and also a loss of memory. I know so much so—there was so much tendency to confusion, and a lack of power to concentrate thought, I advised him very strongly not to undertake any business at all, and what business he did do he did against my advice, for I advised him very specially at that time that he was not in a condition to do business. He was in a condition where a mental effort would be likely to prove fatal. There was also, if I remember, at that time a wavering of his gait, an unsteadiness of the limbs, indications, all of them, tending very strongly to show a severe condition of brain congestion—cerebral congestion; there was at times a lack of action and at times an increased activity of the
201 brain, so much so as to produce an intense distress; during those times he was unable to concentrate his mind at all—rather absent-minded. I know in talking to me sometimes it was difficult for me to get such an answer as I wished from him without repeating the question once or twice. I spent a great deal of time with Mr. Elliott. His case was a critical one, and he was a prominent man at that time. Perhaps all physicians are apt to spend a great deal of time, and I took a great interest in his case on account of the peculiar circumstances, and he had been receiving treatment from others previous to coming to me; perhaps as much so as anything else because, I think, he had been given to understand at that time that perhaps I could not treat him as successfully as some others, and I know he questioned me very closely before I commenced treating him at all in reference to his case, very closely. I think as much so as any person I ever had before me. He was suffering at that time with pain in the left side.

Q. When he was suffering from those attacks of pressure on the
202 brain, was he or not apparently in a condition to observe and take in everything that was going on around him, or was he oblivious?

A. Partially so; at times he was and at times he was not. There were times when he seemed to be better than others. It is just as I say, if anything came up that disturbed him, anything in a business way; for instance, while I was treating him, two or three times he undertook to do some business, and returned to me the next day for his treatment at the

hour appointed very much worse than on the day previous; that I attributed to his effort to do business, and I cautioned him then very strongly against doing it; what he did do, if anything, he did against my advice; any one would advise the same in his condition; any medical gentleman that knows what the conditions of congestion are, or what the results are likely to be where not checked.

Cross-examination by Mr. E. G. MASON:

Q. You say you are not a regular practicing physician?

A. No, sir; I am not a regular practicing physician.

203 Q. How many times did you see Mr. Elliott while he was under your care; about how many?

A. Well, I should say forty or fifty, perhaps more; I could not say; I made no minute of it, and consequently I merely speak from memory; I could not say for certain, perhaps more than that; yes, I should say forty or fifty times.

Q. For how long a period did you treat him?

A. I should think it extended over three months, sir; two or three months. I know frequently at first, and not so frequently afterwards.

Q. Then was he materially benefitted when the treatment ceased?

A. He was. Yes, sir; he was materally benefitted; still I did not consider him then in a condition to do business; he ought not to, at any rate.

Q. Did he come to your rooms at the Grand Pacific for treatment?

A. He did, sir.

Q. Then he was during all that time able to be out?

A. Yes, sir; he was able to be out.

Redirect examination by W. E. MASON:

204 Q. Did he or not live in Chicago during the time that you treated him?

A. I think he did, yes, sir; I think he did. I think he was here specially for treatment at that time and remained here. I could not state for certain whether he had his residence here or not.

Q. Do you recollect when he moved back to Iowa?

A. I recollect when, but I could not give the date, sir. I recollect of his going back.

Q. You commenced treating him sometime before that?

A. Oh, yes, sir; a long time before that.

Mr. E. G. MASON:

Q. How long before that time?

A. Well, I should say nearly a year. I do not know but longer, I could not state for certain about that.

Mr. W. E. MASON:

Q. You are not positive?

A. No, sir; I am not.

Q. About how long it was?

A. I could not say for certain; my memory is not clear on that point; I remember his going back, but I could not say how long it was before I commenced treating him; I treated him more or less, until he did

205 return occasionally, but I could not say how long it was; I should say it was in the neighborhood of a year; perhaps longer.

Signature waived by agreement of counsel.

(Endorsed:) Filed Oct. 24, 1878. Wm. H. Bradley, clerk.

206 *Exhibit B to foregoing report.*

This indenture, made this eighth day of March, in the year of our Lord one thousand eight hundred and seventy-six, between George A. Sackett and Harriet W. Sackett, his wife, of Geneva, Kane County, and State of Illinois, the parties of the first part, and John A. Elliott, the party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of fifteen thousand dollars, in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said party of the second part, his heirs and assigns, all the following described lots, pieces, or parcels of land, situated in the city of Chicago, in the county of Cook, and State of Illinois, to wit:

Lot 15, and part of lot 10, in Gurley's subdivision of blocks twenty-five (25), twenty-eight (28), and thirty-eight (38), in the canal trustees' subdivision of the west half of section twenty-seven (27), town thirty-nine (39) north, range fourteen (14) east of third principal meridian, commencing on the west side of Calumet avenue, ninety-four
207 and $\frac{53}{100}$ feet north of Twenty-fourth street, running along said avenue north fifty feet; thence west and parallel with Twenty-fourth street one hundred and twenty-six feet, thence south and parallel with Calumet avenue fifty feet, thence east one hundred and twenty-six feet, to place of beginning. This conveyance is made subject to a trust-deed executed by the parties of the first part to John De Koven, on the tenth day of May, 1870, securing the notes of said George A. Sackett to Hugh T. Dickey, for nine thousand dollars, due four years from that date, with interest of nine per cent. per annum, interest payable semi-annually; and a further extension of payment, commencing on the tenth day of May, 1874, for same amount above mentioned, (nine thousand dollars,) payable in five years from said date, with interest of nine per cent., the interest notes payable semi-annually, which debt, with its interest, the said party of the second part assumes and agrees to pay as part of the consideration of this conveyance or purchase price above stated. The covenants hereafter are subject to the above encumbrance. Together with all and
208 singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and all the estate, right, title, interest, claim, and demand whatsoever of the said party of the first part, either in law or equity, of, in, and to the above-bargained premises, with the hereditaments and appurtenances; to have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs, and assigns forever; and the said George A. Sackett and Harriet W. Sackett, party of the first part, hereby expressly waive, release, and relinquish un-

to the said party of the second part, his heirs, executors, administrators, and assigns, all right, title, claim, interest, and benefit whatever in and to the above-described premises, and each and every part thereof, which is given by or results from all laws of this State pertaining to the exemption of homesteads.

And the said George A Sackett and Harriet W. Sackett, the party of the first part, for themselves and their heirs, executors, and administrators, do covenant, grant, bargain, and agree to and with the said
209 party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents, they are well seized of the premises above conveyed as of a good, sure, perfect, absolute and indefeasible estate of inheritance in law and in fee simple, and have good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and encumbrances of what kind or nature soever; and the above-bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

In testimony whereof the said parties of the first part, have hereunto set their hands and seals the day and year first above written.

Interlin'ation on twenty-first line made before signing.

GEORGE A. SACKETT. [SEAL.]
HARRIET W. SACKETT. [SEAL.]

Signed, sealed, and delivered in presence of.

210 STATE OF ILLINOIS,
Kane County, ss:

I, Pinder F. Ward, a notary public in and for the said county in the State aforesaid, do hereby certify that George A. Sackett and Harriet W. Sackett, personally known to me as the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this eighth day of March, A. D. 1876.

[SEAL.] P. F. WARD,
Notary Public.

STATE OF ILLINOIS,
Cook County, ss:

No. 75969. I, James Stewart, recorder within and for the county and State aforesaid, do hereby certify that the within and foregoing instrument of writing was filed for record on the 10 day of March, A. D. 1876, at 10 o'clock a. m., and duly recorded in volume 458 of records on page 445. In testimony whereof I have hereunto set my hand the day and date aforesaid.

JAS. STEWART,
Recorder.

211 On the same day, to wit, the 24th day of October, A. D. 1878, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOHN A. ELLIOT
v.
GEORGE A. SACKETT ET AL. } In chancery.

Now come the parties by their solicitors and on motion this cause is set down for hearing upon the original and cross bills, pleadings, and proofs herein, and after hearing the same, the court, not being now sufficiently advised in the premises, takes the same under advisement.

Afterwards, to wit, on the 4th day of December, A. D. 1878, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOHN A. ELLIOTT
v.
GEORGE A. SACKETT AND HUGH T. DICKEY. } In chancery. Original bill.

and

HUGH T. DICKEY
v.
JOHN A. ELLIOTT, GEORGE A. SACK-
212 ett, Harriet W. Sacket, John De Ko-
ven, trustee, John Mattocks, successor
in trust, and Benjamin W. Underwood. } Cross-bill.

On this day come the parties by their solicitors, and the court being fully advised in the premises doth order and decree that said original bill be dismissed for want of equity, at complainant's costs, and this cause coming on to be further heard upon the cross-bill of complaint herein taken as confessed by said defendants George A. Sackett, Harriet W. Sackett, John De Koven, trustee, John Mattocks, successor in trust, and Benjamin W. Underwood, and the answer, pleadings, proofs and exhibits therein, and upon the report of Henry W. Bishop, master in chancery of this court, bearing date the twenty-second day of October, A. D. 1878, filed herein on the twenty-fourth day of October, A. D. 1878, and made in pursuance of the order of reference entered herein on the second day of July, A. D. 1878, and said report having been read and examined and no cause to the contrary having been shown, it is ordered and adjudged by the court that the same and the matters of account therein stated by said master be fully approved and confirmed.

And this cause having been argued by counsel, and the court being fully advised in the premises, upon consideration thereof finds and ad-
213 judges that all the material allegations in said cross-bill contained are proved, that the equities herein are with said complainant in said cross-bill, and that there is now due to the complainant in said cross-bill in this cause from said defendant George A. Sackett the sum

of eleven thousand three hundred and ninety-nine dollars and twenty-eight cents, the same being the amount found due in said report, together with the interest subsequently accruing from the date of said report to the date of this decree, and that said defendant John A. Elliott has, for a valuable and sufficient consideration, assumed and agreed with said Sackett to pay the amount due on said mortgage to said complainant.

It is, therefore, on motion of counsel for said complainant in said cross-bill, ordered, adjudged, and decreed by the court that said defendants George A. Sackett and John A. Elliott, or one of them, pay or cause to be paid to the complainant in said cross-bill, within one day from the date of the entry of this decree, said sum of eleven thousand three hundred and ninety-nine dollars and twenty-eight cents, with interest thereon at the rate of six per cent. per annum from the twenty-second day of October, A. D. 1878 (being the date of said master's report), to the day of such payment, and also pay into court the costs in this cause taxed; and in case such pay-
214 ment is not made by said defendants or one of them, some other defendant to this cause, within said one day, that the premises described in said cross-bill of complaint, to wit, all the premises situate in the county of Cook and State of Illinois, known and described as lot number fifteen (15) and part of lot number ten (10), in Gurley's subdivision of blocks number twenty-five (25), twenty-eight (28), and thirty-eight (38), in the canal trustees' subdivision of the west half of section number twenty-seven (27), township thirty-nine (39) north, range fourteen (14) east of the third principal meridian, bounded as follows, to wit: Commencing on the west side of Calumet avenue ninety-four and fifty-three hundredths ($94\frac{53}{100}$) feet north of Twenty-fourth street, running thence along said avenue north fifty (50) feet, thence west and parallel with Twenty-fourth street, one hundred and twenty-six (126) feet, thence south parallel with Calumet avenue fifty (50) feet, thence east one hundred and twenty-six (126) feet to the place of beginning, with all and singular the privileges and appurtenances thereunto belonging, or so much thereof as may be sufficient to satisfy the amount of money hereinbefore adjudged to be due to the complainant in said cross-bill, with interest thereon and the costs in this case, and which may be sold separately without material injury to the parties interested be sold at public auction to the highest and best bidder, for cash, by Henry W.
215 Bishop, the master in chancery of this court, at the front door on La Salle street of The National Life Insurance Company's building, numbers 157 to 163 La Salle street, Chicago, Cook County, Illinois; that said master give notice of the time, place, and terms of such sale by publication at least once in each week for three successive weeks in some newspaper published in the county of Cook and State of Illinois, and that on making such sale he proceed according to the statute of said State of Illinois in cases of sale under decrees of foreclosure of mortgage; that he execute to the purchaser or purchasers, as the case may be, a certificate or certificates evidencing such purchase, and conditioned that if the premises sold to such purchaser or purchasers be not redeemed according to law, such purchaser or purchasers, or his or their assigns, will be entitled, at the expiration of fifteen months from the day of sale, to a deed or deeds of the premises so sold, according to the form of the said statute of said State, and that he file a duplicate or duplicates of such certificate or certificates

for record in the office of the recorder of deeds of said county; and, further, that at such sale the complainant in said cross-bill, or any of the parties to this cause, may become the purchaser.

It is further ordered that said master may continue or adjourn any sale so advertised by him for good reason in his discretion, he always
216 giving notice of such adjourned sale as in the first instance.

It is further ordered that if said premises, or any parcel thereof, shall be sold to the complainant in said cross-bill, he shall be required to pay to the master only so much of his bid as shall, after applying the moneys received from other purchasers at such sale, on the costs of this suit and of sale, be necessary to satisfy any unpaid balance of such costs or to pay any excess of said bid remaining after satisfying such costs over and above the amount due the complainant in said cross-bill under this decree.

It is further ordered that said master make report to this court of such sale and of his acts and doings hereunder, for approval and confirmation, and for further direction herein; and that he retain from the proceeds of said sale the amount of his fees, disbursements, and commissions thereon, and bring the residue of such proceeds, if any, into court, to abide the further order of the court, and that he take the receipt of the clerk of this court therefor, and file the same with said report; and if the moneys arising from such sale shall be insufficient to pay the amount so found adjudged to be due to the complainant in said cross-bill, with the interest thereon, and the costs of suit and the expenses of sale aforesaid, that the said master specify the amount of such deficiency in his said report of sale.

217 And it is further ordered that the clerk of this court hold such moneys, so to be paid him by said master, subject to the further order and direction of this court in this cause.

It is further ordered and decreed by the court that upon the expiration of fifteen months from the date of such sale, if the lands so sold shall not have been redeemed as provided by law, said defendants, and all persons holding or claiming under them, or any of them, since the commencement of this suit, stand forever barred and foreclosed of all rights and equity of redemption in and to said premises so sold, and every part thereof; and that in case the premises therein mentioned are not redeemed as aforesaid, upon production to said master, or his successor in office, of any certificate of purchase aforesaid by the purchaser or purchasers, their heirs, or assigns, said master or his successor make, execute, and deliver to such holder of said certificate a good and sufficient conveyance in fee of the premises described, or intended to be described, in such certificate; and further, that upon execution of such conveyance, the grantee or grantees in such deed, their heirs or assigns, have possession of the premises conveyed in such deed, and that any of the parties to this cause who shall be in possession of said premises, or any part thereof, and every person who may have come into such possession under them, or any of
218 them, since the commencement of this suit, deliver possession of and surrender said premises to such grantee or grantees, their heirs or assigns, as the case may be, upon production of such deed of conveyance.

And it is further ordered and decreed that in case said George A. Sackett shall pay said indebtedness, or any part thereof, he shall have leave to apply to this court, on notice to said Elliott for a further order at the foot of

this decree, requiring said Elliott to repay to said Sackett the sum so paid on said indebtedness.

And thereupon the said John A. Elliott, by his solicitors, prays an appeal to the Supreme Court of the United States, which is allowed upon his giving bond herein in the sum of five thousand dollars, with security to be approved by the court.

And afterwards, to wit, on the 18th day of February, A. D. 1879, said complainant, by his solicitors, filed in said clerk's office his appeal bond in said entitled cause, which said appeal bond is in the words and figures following, to wit:

Appeal bond.

Know all men by these presents that we, John A. Elliott, of Des Moines, Polk County, State of Iowa, as principal, and John W. Ulm, of Chicago, county of Cook, State of Illinois, as surety, are held and firmly bound
219 unto George A. Sackett, of Geneva, Kane County, State of Illinois, and Hugh T. Dickey, of Newport *Rhode Island* County, State of Rhode Island, in the penal sum of five thousand dollars ($5,000.00), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly, severally, and firmly by these presents. Witness our hands and seals this 12th day of December, 1878.

The condition of the above obligation is such that, whereas in a certain cause then pending in the circuit court of the United States, in and for the northern district of Illinois, in chancery, wherein John A. Elliott, of Des Moines, State of Iowa, was complainant and the said George A. Sackett, of Generd, State of Illinois, and said Hugh T. Dickey, of Newport, State of Rhode Island, were defendants, there was made and entered of record, in said cause, on the fourth (4) day of December, 1878, a decree dismissing the said bill of complaint of said complainant for want of equity, and rendering judgment against the said complainant for the costs of said suit and decreeing that said John A. Elliott should pay to said Hugh T. Dickey the sum of eleven thousand three hundred and ninety-nine dollars and $\frac{28}{100}$ ($11,399$\frac{28}{100}$), from which said judgment of the said circuit
220 court the said complainant, John A. Elliott, of Des Moines, State of Iowa, prayed for and obtained an appeal to the Supreme Court of the United States: Now, therefore, if the said John A. Elliott, of Des Moines, State of Iowa, shall duly prosecute this said appeal with effect, and moreover pay the amount of the judgment, costs, and damages rendered and to be rendered against him in case the said judgment and decree shall be affirmed in said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue.

JOHN A. ELLIOTT. [SEAL.]
JOHN W. ULM. [SEAL.]

Approved subject to right of def'ts' sol'rs to move for further security if they shall be dissatisfied with surety.

H. W. BLODGETT, *Judge.*

(Endorsed:) Feb'y 18, 1879. Filed nunc pro tunc by order of court, as of Dec. 13, 1878. Wm. H. Bradley, cl'k.

And on the same day, to wit, the 18th day of February, A. D. 1879, in the record of the proceedings of said court, in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

221	JOHN A. ELLIOTT *vs.* GEORGE A. SACKETT AND HUGH T. DICKEY.	In chancery. Original bill.
	and	
	HUGH T. DICKEY *vs.* JOHN A. ELLIOTT, GEORGE A. SACKETT, Harriet W. Sackett, John De Koven, trustee, John Mattocks, successor in trust, and Benjamin W. Underwood.	Cross-bill.

Now comes said John A. Elliott, by M. R. M. Wallace, his solicitor, and on his motion leave is given said John A. Elliott to file his bond on appeal herein, nunc pro tunc, as of the thirteenth day of December, A. D. 1878.

222 NORTHERN DISTRICT OF ILLINOIS, *set:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein John A. Elliott was the complainant and George A. Sackett and Hugh T. Dickey were the defendants, as appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 30th day of September, A. D. 1879, and of our Independence the one hundred and fourth.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsement on cover:) No. 152. John A. Elliott, appellant, vs. George A. Sackett and Hugh T. Dickey. N. Illinois C. C. U. S. Filed 17th November, 1879.

OFFICE SUPREME COURT U. S.
FILED
JAN 29 1903
JAMES H. McKENNEY, Clerk

108-132

IN THE

Supreme Court of the United States.

No. 152.

JOHN A. ELLIOTT, *Appellant*,
vs.
GEORGE A. SACKETT AND HUGH T. DICKEY, *Appellees.*

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF OF WM. E. MASON, FOR APPELLANT.

WALLACE, MASON & MEDBURY,
FOR APPELLANT.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH STREET, CHICAGO.

IN THE

Supreme Court of the United States.

No. 152.

JOHN A. ELLIOTT, *Appellant*,
vs.
GEORGE A. SACKETT AND HUGH T. DICKEY, *Appellees*.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

STATEMENT OF FACTS.

In March, 1875, John A. Elliott, then and now a citizen of Des Moines, Iowa, moved to Chicago, and remained about a year, engaging a part of his time in real estate business.

Henry L. Hill, a well known real estate dealer, called upon Mr. Elliott and offered to sell or trade to him the property in controversy. He was the agent of George A. Sackett, one of the defendants in the case, and was not nor had he ever been at that time, the agent of John A. Elliott.

Mr. Elliott made a proposition of trade, based upon condition that he should simply buy the equity owned by Mr. Sackett; but Mr. Hill desired him to assume the incumbrance amounting to over nine thousand dollars. It being at a time when Chicago real estate was of doubtful value, and it being contrary to Mr. Elliott's established custom, he refused to assume the incumbrance.

Mr. Hill finally reported that he would make the trade as desired by Mr. Elliott, and brought him a contract to sign, which was signed by Mr. Sackett. Mr. Elliott examined the contract and refused to sign it, because it contained a clause to "*assume*" the incumbrance, instead of "*subject to*" the incumbrance.

Mr. Hill took the proffered agreement, and returned with the one in evidence, signed by Mr. Sackett, and which uses the term, "subject to" the incumbrance, and not one word of assumption on the part of Mr. Elliott. This they both signed, and it is in evidence. This contract was signed on the 18th day of February, 1876, and on the 8th day of March, Mr. Sackett deeded to Mr. Elliott the property in question.

Both contracts were in the handwriting of Mr. Hill, and signed by Mr. Sackett. The deed is in the handwriting of Mr. Sackett. Mr. Sackett delivered the deed to Mr. Elliott, and Mr. Elliott, being in ill health, handed the deed to Mr. Ulm, and asked him to record it. Mr. Elliott assumed that the deed was according to the full and fair understanding and according to the written contract, and did not know different until about a year afterwards.

Mr. Elliott returned to Iowa with his family, on the 15th of March, a few days after he received this deed from Mr. Sackett. The property was not at the time,

nor has it since been worth the amount of the incumbrance.

As soon as he discovered that the deed was not in compliance with the contract, he immediately, on April 28, began his suit in the Superior court of Cook county, in chancery, setting up these facts and asking to have the deed reformed, according to the agreement of the parties.

Hugh T. Dickey, by Mr. DeKoven, his agent, had, in 1870, loaned to Mr. Sackett, nine thousand dollars upon the property, for three years, which on maturity was extended for five years longer. Owing the note before the deed of Sackett to Elliott, and still owing it, he stands, in case the deed is reformed, exactly where he placed himself in 1870, with the note of Mr. Sackett secured upon the property in question. He paid no consideration, nor did he extend payment or do anything to secure Mr. Elliott as additional security. In other words, no one has purchased the note on the strength of Mr. Elliott's supposed assumption.

Upon a hearing in the court below, the court entered a decree ordering a sale, and ordering further that in case the property did not satisfy the incumbrance, that judgment be entered against Mr. Elliott for the deficiency.

Assignment of Errors.

The case was heard on depositions taken before a master in chancery, who did not rule upon objections to testimony, nor make any recommendation as to a deficiency decree. The case was heard, the depositions being read in full, as certified back by the master, the court not making any ruling upon specific objections when reached. The assignment must, therefore, be made upon the record.

1st. The court erred in admitting evidence on the part of appellee and against the objection of appellant.

2d. The court erred in refusing to receive evidence offered by appellant and objected to by appellee.

3d. The court erred in its finding of facts.

4th. The court below erred in its finding of the law in the cause.

5th. The court below erred in entering against Jno. A. Elliott a deficiency decree.

1st. The court erred in admitting improper evidence against appellant's objection.

Mr. Hill was Mr. Sackett's agent, and Mr. Sackett depended on him, as his agent, to fix the matter of assumption by Mr. Elliott. Mr. Sackett had signed two contracts of sale to Elliott, the first assuming liability by

Elliott, the second striking that out. Hill had presented himself as Sackett's agent in and about the sale of the property, and had presented two papers with Sackett's signature. Elliott had a right to presume that he was in full authority from Sackett.

On page 41, printed record, defendant seeks to vary or limit his authority by parol, showing conversations between Sackett and Hill, of which Elliott had no knowledge.

"Q. What were your instructions to Mr. Hill about "that incumbrance?

(Counsel for complainant objected to any conversation between Mr. Sackett and his agent, because it is immaterial and incompetent to bind complainant in the original bill.)

"A. I instructed him to sell the property subject to "the incumbrance, so as to free me from all liability."

The court below, as a basis of its decision, must have allowed Mr. Sackett to have testified to a private understanding between himself and his agent, unknown to Mr. Elliott, and then, after admitting the evidence, found it to be true. In both admitting and believing the evidence, we respectfully submit, and hope to show this court, that the court below was in error.

As to the admission of this evidence, we desire to say: Mr. Hill was the agent of Sackett *alone*. There was no such relation existing between Mr. Elliott and Mr. Hill. Mr. Elliott says (pages 60–61 printed record):

"Q. Who did Mr. Hill represent in this?

"A. Mr. Sackett.

"Q. Did you pay Mr. Hill any commission?

"A. No, sir.

"Q. Was he, in anywise, employed by you?

"A. Not at all."

Mr. Hill testifies that he was the agent of Sackett. That Mr. Elliott did not pay him anything; that Mr. Sackett did—or agreed to. And Mr. Sackett says (page 41):

"I never had any conversation between Mr. Elliott and "myself in regard to that liability. *I depended on Mr.* "*Hill as my agent in fixing that thing.*"

Counsel for appellee tried to draw out the fact that Mr. Hill was also agent for Elliott to sell some of his (Elliott's) property. If it were true, it would not alter the case, but it is not true, as a matter of fact. Mr. Elliott did not put property in Mr. Hill's hands for sale until after this negotiation with Mr. Hill, as Sackett's agent.

Mr. Hill, then, being the agent of Mr. Sackett, and coming clothed with authority which Sackett approved and ratified by placing in his hands contracts of sale signed by himself, clearly he should not be allowed to say to the court that in the important matter of consideration he (his agent) had by fraud or mistake violated his principal's instructions.

"The Roman law lays peculiar emphasis on the duty "of the principal in selecting the agent, taking the position "that where, through the infidelity of the agent, loss "occurs, this loss should be ordinarily borne by the "principal from whom the appointment springs, rather "than by an innocent stranger dealing with the agent."

Wharton on Agency & Agents, Sec. 40.

Mr. Hill being Mr. Sackett's agent, his understanding was the understanding of Mr. Sackett. His representations and agreements relating to any part of this trade or sale was the representation and agreement of Mr. Sackett, and it is manifestly unfair and unjust to allow Mr. Sackett to send for his agent a man to agree to sell the property on certain terms, then vary the terms when he makes the deed, and when the error or fraud is discovered, be allowed to say, my agent violated my instructions.

As to the courts accepting Mr. Sackett's evidence as true, we have to say: We think we can satisfy this court by a fair analysis of the evidence, that Mr. Sackett's evidence is absolutely false, and that he resorted to a sharp and dishonorable trick to unload his debts on the shoulders of Mr. Elliott.

Mr. Elliott testified (page 61): "Mr. Hill had offered "this property to me, and wanted me to trade for it some "months before the contract was made, and asked me to "assume the mortgage and incumbrances. I told him I "never assumed an incumbrance, and would not trade for "any property and assume any incumbrance. Along in "January he offered to trade me the equity—to trade it to "me subject to the incumbrance. He made out the con- "tract and brought it into my office, 162 Washington "street, and, examining the contract, I noticed that he "had written in 'to assume the incumbrance.' I said: "'Mr. Hill, that was not our contract,' that he knew very "well I would not assume. I had told him so before, fre- "quently. Mr. Hill then put the contract in his pocket, "and in a short time afterward—a few days—brought in "another contract in which I took this property, as I had "agreed upon, subject to this incumbrance, but I did not "assume it in any form or shape." * *

And further, same page:

"Q. At the time he presented that agreement which "you declined to sign, was it or not, signed by Mr. "Sackett?

"A. Yes, sir; it was signed by Mr. Sackett."

Mr. Elliott, it is true, is an interested witness—interested to the same extent that Mr. Sackett is, but he is not unsupported in his evidence.

Mr. Hill testifies (printed record, 73):

"Q. Was that (Exhibit A) the first contract you "drew?

"A. No, sir; I drew another which was objected to "by Mr. Elliott.

"Q. Did you present it to Mr. Elliott for his signa-"ture?

"A. Yes, sir.

"Q. Can you produce the other contract?

"A. No, sir; I don't know as I can. I do not think "it was preserved.

"Q. You say Mr. Elliott refused to sign that con-"tract?

"A. Yes, sir.

"Q. What reason did he assign for refusing to sign "that?

"A. On account of assuming the liability.

"Q. Did the first contract you presented to him state "in terms that he was to assume that incumbrance?

"A. I think it did.

"Q. And he refused it on that account?

"A. Yes, sir.

"Q. What did you then do?

"A. I wrote this contract and made it subject. He "bought the property subject to the incumbrance in- "stead of assumed it. He bought it subject to it, as this "contract specifies."

Now, Mr. Sackett must have known that he had signed two contracts to Mr. Elliott for this property. That the first contract was refused, and that a second one was signed by him. Why did he sign two contracts? Could he have done so without some reason? Would Mr. Hill, a reputable business man, for the sake of a small commission, deceive Mr. Sackett as to the contents of the contract, with almost certain discovery staring him in the face, when the deeds were drawn, and passed? Did he honestly expect Mr. Elliott to assume the nine thousand incumbrance when he (Sackett) would not and did not assume the incumbrance on Mr. Elliott's land and lots? Mr. Sackett testifies, page 41, against our objection, that Mr. Hill "never said anything about Mr. "Elliott refusing to assume the liability, for I never "should have sold the property without he had."

Then, upon his cross-examination (page 43), says he considered the property "worth two or three thousand "dollars over and about the incumbrance." How consistent! Then, further, he says (page 42), referring to small note given the day deeds were passed:

"I was very hard up, and I could not spare the money "to pay it. I gave Mr. Elliott a note, payable at some "bank here, I think."

And then the first two questions on cross-examination he testified:

"Q. What was your condition financially at the time "you made this trade with Mr. Elliott?

"A. I was doing business on the board of trade, and "I had some means—some few thousand dollars in cash "in my business.

"Q. At the time you drew this deed, what was your "condition financially?

"A. Well, I had money. I was in fair condition "then."

This just for a sample to show that he intended to make his evidence meet every emergency as it arose, or else showing a most defective memory, which might account for his not remembering the facts as his own agent remembers them.

This last evidence was taken Thursday, and the further taking was adjourned till Saturday. Mr. Sackett then took the stand, and testified, in response to the first question of counsel (page 45):

"The price agreed upon for this property was $15,000. "It was paid to me by the assuming of this mortgage, "which was $9,000," and some Evanston lots and Iowa land.

It occurred to appellant's counsel that he had grown wonderfully clear on that point during the short adjournment, and for the purpose of testing his memory asked him (page 46) with whom he had talked during adjournment on that point. He denies positively, both to appellants and his own counsel, that he had any conversation with any one on that point, and when it gradually dawns upon his mind that it was not actually a crime, he admits that "he *may have had a little* talk with Mr. Mason about

"that," but that he "did not suggest it to Mr. Mason." Then coming to the point again (page 47):

"Q. You think you have talked some with Mr. "Mason in regard to this point of consideration, since you "were examined here the other day?"

Here it gradually dawns upon him that it would not be specially improper, and he answers without qualification, that "there was something said about it in Mason's "office."

Mr. Sackett's statement as to consideration cannot possibly be true. Mr. Hill, his agent, says it is not true. Mr. Elliott says it is not true. The contract itself says it is not true; that of the $15,000, $9,000 was to be "sub-"ject to," and not assumed by, Mr. Elliott; and all the circumstances surrounding the case, make it almost an absurdity that Mr. Elliott would actually pay in property and assumption of notes $15,000 for this property. Then, again, Mr. Sackett says (page 47):

"Q. How many contracts did you sign?

"A. One.

"Q. Do you swear you did not sign two?

"A. Yes, sir."

Against that we have the evidence of Mr. Hill and Mr. Elliott, who say that the first contract presented by Hill was refused by Elliott on account of assumption clause; that it had Sackett's signature. Mr. Hill says that was destroyed, and that he drew the one in evidence (which has the signature of Mr. Sackett, as shown by the proof), and that is the one Mr. Elliott accepted and signed.

His answer, sworn to on the 28th day of June, 1877, states that he did solicit Mr. Elliott to assume the incum-

brance, and denies that Elliott refused to do so, and states "solemly," and under his oath, that he will, "at the "proper time and place, prove the truth to be that when "the negotiations and detail preliminary to the final com- "pletion of the transactions upon which this suit was "brought, were ended, and the parties were ready to close "the transaction by the delivery of the deeds, it was fully "and fairly understood by the parties to the same that a "warranty deed conveying said premises, 166 Calumet "avenue, should and would be accepted by the said "Elliott, with the condition of conveyance therein pro- "vided, viz: that the said Elliott did assume and agree "to pay, as a covenant of said deed, the beforementioned "$9,000, and interest semi-annually, and the warranty "deed of the defendant contained that provision ac- "cordingly."

This sworn answer is contrary to the sworn evidence of every other witness who testified on the point, in this suit not even excepting Mr. Sackett himself, for on the 10th day of October, 1878, when he had no doubt forgotten the "theory" of his case, he testified (page 41 of record) as follows:

"Q. Did he (Mr. Elliott) then refuse or decline to "assume this liability in conversation with you?

"A. I never had any conversation between Mr. Elliott "and myself in regard to that liability. *I depended on* "*Mr. Hill, as my agent, in fixing that up.*"

Where, now, is the imaginary agreement before deeds passed, that Mr. Elliott would "*assume*," as a part of consideration, the $9,000 note? Could it have been between Elliott and Hill? No; they both deny it. Can his detailed statement, sworn to "solemnly," be true? No; he

denies it under oath on the witness stand. If the court believe his first oath they must discredit the last. Where, we ask this court, and on which side will you weigh his evidence, when it is found to be on both sides?

We were considerably surprised a few moments ago that in his evidence Mr. Sackett swore that at the time he sold to Elliott "he considered the property worth "$2,000 or $3,000 over and above the incumbrance," and yet wouldn't sell under any circumstances unless Mr. Elliott assumed that incumbrance. We are considerably more surprised in glancing over his answer, which he so "solemnly" swore to, that (page 19): "At the time of "said transaction this defendant and others who were "considered competent to estimate the value of said prop- "erty, estimated the same to be worth at least $15,000, "and the moving influence to induce this defendant to "make said exchange was that this defendant might lay "down the burden of so large a debt, and to do so suffered "what he and others at the time considered a very large "sacrifice in the value of the said property."

Answer sworn to June, 1877, evidence October 10, 1878, swearing both times as to the same thing, *i. e.*, the condition of his mind and judgment as to the value of the premises at the the time of the sale to Elliott, he varies from $6,000 down to $2,000 or $3,000, and he is willing to sacrifice $6,000 rather than hold $15,000 worth of real estate with an incumbrance of $9,000. Can this court believe that any man honestly thought this property worth $15,000, and then would not sell unless some one assumed the liability and relieved him of it.

Which, if either, shall we believe, Sackett on the witness stand, or Sackett in his sworn answer. Mr. Sackett says (page 44):

"I have done a great deal of my own law business. I "have had some cases in chancery where I have drawn "up my answers. But still they have always been cor- "rected by my attorneys." Will it be safe to accept his answer where it conflicts with his evidence, because he "solemnly" has sworn to it, and if we did, might it not drive him in the future to drawing his own answers, standing by them, and submitting his evidence to his attorneys for correction?

Thus it will be seen by this court, that upon every material point, Mr. Sackett contradicts his agent, Mr. Hill, Mr. Elliott, the appellant, and every document in evidence in the case, except the one drawn by himself, and it is on account of this steady conflict, a part of which we have shown, that we respectfully insist that one of the great errors in the case below was in the court accepting as true the evidence of Mr. Sackett.

There is one more disinterested witness which we have overlooked, whose evidence sustains that of Mr. Elliott and Mr. Hill. Jno. W. Ulm testifies that he has no interest in the result of the suit; that he officed with Mr. Elliott at the time Hill came about the contract. He says, (p. 56): "I recollect of Mr. Hill's coming in with the con- "tract; the contract I did not see, but the conversation "turned upon the subject of assuming the incumbrance "described in the contract, which Mr. Elliott refused to "do. Don't know what Hill did with the contract; he "left the office. I understood the contract to cover this "property from the conversation. * * I under- "stood that Mr. Elliott refused to sign the contract "brought in there by Mr. Hill, from the fact that it was "not explicit in regard to the incumbrances. He wanted "to have it 'subject to' and not use the word 'assume.'

" * * * (p. 58). I do not recollect what Hill " said in that conversation. It was more about their busi- " ness actions there. I know they kind of flared up just " at that time, and it attracted my attention; I was not " interested in the trade."

All of this in support of the theory that Mr. Elliott did not intend to assume that incumbrance, and is contradicted alone by the evidence of Mr. Sackett, who says himself, that he never talked with Elliott about the liability, that he " depended on Mr. Hill as my agent in fixing that " thing," (page 41), and the fact that Mr. Elliott, without full examination and while ill, handed the deed to Mr. Ulm to be recorded (see evidence of Mr. Elliott, p. 70). And Mr. Ulm (page 58) says:

" I recollect taking a deed a short time before he left " the city to the recorder's office. Mr. Elliott came in " complaining of being unwell, and wished I would take " it for him to be recorded."

2d. *The court erred in refusing to receive and consider evidence offered by appellant, and objected to by appellee.*

We offered a line of evidence, showing all of the facts and circumstances, leading up to the contract and deed. The court below gave its opinion, and upon that opinion based the deficiency decree, that the deed was the best evidence of the intention of the parties, and could not be modified either by parol evidence or by the introduction of the *written* contract on which the deed was based. This may be the rule in a class of cases where neither fraud or mistake is charged, as it is in this case. But if it is to be the rule adopted by this court in this class of cases, then it will be absolutely impossible ever to reform

a contract, though the greatest mistake had occurred or the most manifest fraud had been perpetrated.

3d. *The court erred in its finding of facts.*

We have discussed the question of fact somewhat under the other assignments, and we desire to discuss them more at length in the argument.

4th. *The court below erred in its finding of the law of the cause.*

The court below wholly ignored and refused to consider the question of agency involved in the cause, and raised by appellant's counsel, and in its opinion delivered did not even mention or dispose of the question of who Mr. Hill was agent for and represented in the trade.

We respectfully submit, that as a matter of fact Mr. Sackett must have well known that Mr. Elliott would not assume that large incumbrance; but we further submit, as a matter of law, that it made no difference whether Mr. Sackett knew it or not.

Waiving for a moment the question of fraud, and for the purposes of argument conceding the proposition to be correct that a contract can not be reformed on account of mistake, unless it is a *mutual* mistake; yet still does this case not come within the rule; for if the court finds that Mr. Sackett was really honest in his claim that Mr. Elliott was to assume (which we deny) yet if he employed as his agent a man to trade with Mr. Elliott who told him he should not assume, and that on the strength of such representations of Mr. Sackett's agent, Mr. Elliott signed the contract, then the agreement of Mr. Sackett's agent would be binding on Mr. Sackett, and if there is a mistake or variance between the verbal and written agreement of

Sackett's agent and Mr. Elliott, and the deed drawn by Sackett, to carry out his agent's contract, then as a matter of law, it is a *mutual* mistake.

And when the minds of Mr. Elliott and Mr. Hill, as Mr. Sackett's agent, met and agreed, then, as a matter of law, Mr. Sackett's and Mr. Elliott's minds met and agreed, and that agreement, as a matter of law, should be carried out, and could only be varied in three ways, *viz:* Mistake, fraud, or agreement.

It could never have been changed by agreement, because both Mr. Elliott and Mr. Sackett say positively they never talked with each other about it. Mr. Sackett says he "relied on Hill as his agent." Mr. Elliott relied on making the trade with Hill as Mr. Sackett's agent, and assumed, as he had a right to, that the deed would be made to conform to the agreement between himself and Mr. Hill as Sackett's agent.

In other words, Mr. Sackett cannot take advantage of any fraud or deceit practiced by Mr. Hill, as his agent, acting so clearly within the scope of his authority, on Mr. Elliott, for in so doing he is taking advantage of his own fraud.

In *Cochran* v. *Chitwood*, 59 Ill., 53, the court decided that where an agent acting under general authority from his principal and make a sale, sold to another two mules, and the principal subsequently ratified the sale by accepting from the agent the note given for the purchase money, then the principal was bound by any warranty of the agent to the purchaser in regard to the soundness of the mules.

This case with the change of the word "mules" to "land" is the case before this court.

If this was not the law, how very unsafe would it be to do business with a principal through his agent? If it was not the law, Mr. Sackett could send out his agents with written contracts signed by himself, agreeing to deed to "A" a block in the heart of the city of Chicago, free of incumbrance, in consideration of ten thousand dollars. Then if he could, by accident or illness to "A" or too much confidence of "A" in himself, get "A" to receive and record a deed of one acre in the country mortgaged for more than its full value, and reciting that "A" was to pay him ten thousand dollars and to assume twenty thousand dollars of his notes due to some one, his creditors would be happy, and could recover under the ruling of the court below, for the court holds that, notwithstanding all the facts and evidence, notwithstanding the fact that Mr. Sackett's own agent says that Elliott was only buying the "equity," and he agreed Elliott should not assume the mortgage, and got Mr. Sackett to change the contract for that purpose, yet the deed was the last paper passing between the parties, and was the best evidence of their contract.

Mr. Sackett's agent goes on to the stand and swears that it was not the deed called for and paid for by "A," that as Mr. Sackett's agent, he drew, and Mr. Sackett signed, a contract without one word of the assuming $20,000 by *A*, and that the property was not the property called for in the contract; yet if Mr. Sackett swears the deed was according to *his* understanding of the contract, *A* is forever barred, and must not only accept the one country acre, but must pay $20,000 of Mr. Sackett's debts.

This is not an exaggeration, for if Mr. Sackett can vary his written contract, and vary and avoid the agreement of

his agent by simply saying it was "his understanding," we respectfully submit that he could have changed the deed from the terms of his own contract and his agent's agreement in any and all respects if he could have been able to have secured the recording of the deed by the other party to the contract.

It will be claimed by appellees that Mr. Elliott having accepted the deed and recorded it, he is bound by its terms and provisions. This is not the law. If at the time he accepted the deed he had read it through and had been fully aware that it contained the assumption clause, there are grave doubts in our mind whether a deficiency decree should be entered in this case, but where he did not know its contents, and was deceived by the principal and his agent, then clearly under the former decisions of this court, the mere accepting the deed would not bind him to its provisions.

The case of *Snell* v. *Insurance Company*, 8 Otto, 85, sustains our position. Thomas Snell being a member of the firm of Snell, Taylor & Co., applied to the insurance company through its duly authorized agent for insurance covering cotton. Mr. Snell consented to have the policy made in his name, upon the representation by the company's agent that the interest of the whole firm would be thereby protected. The policy was issued and delivered to Mr. Snell, who was advised by his attorney that the policy would only cover *his* interest, but not that of the firm, and he forthwith requested the company to reform or correct the policy so that it would conform to the agreement between himself and the company.

Held, first, that the acceptance of the policy was *not* such as waived any right of Snell, Taylor & Co. in the agreement made between them and the company by Mr.

Snell and the agent of the company, and that the firm of Snell, Taylor & Company were entitled to have the policy reformed. Then, clearly it seems to us, the mere acceptance by Mr. Elliott of this deed from Sackett, was not a waiver of his right to have his deed reformed to agree with his contract.

In the case cited, Mr. Justice HARLAN said: "We "have before us a contract, from which, by mistake, ma- "terial stipulations have been omitted, whereby the "true intent and meaning of the parties are not fully or "accurately expressed. A definite, concluded agreement "as to insurance, which, in point of time preceded the "preparation and delivery of the policy, is established by "legal and exact evidence which removes all doubt as to "the understanding of the parties. In the attempt to re- "duce the contract to writing there has been a mutual "mistake caused chiefly by that party who now seeks to "limit the insurance to an interest in the property less "than that agreed to be insured. The written agree- "ment did not effect that which the parties intended. "That a court of equity can afford relief in such cases "we think well settled by the authorities."

Will the court please permit us to state the case at bar:

"We have before us a contract (in) which material "stipulations have been (inserted), whereby the true in- "tent and meaning of the parties are not fully or accu- "rately expressed. A definite conclusion or agreement "as to (assuming incumbrances) which in point of time "preceded the preparation and delivery of the (deed) is "established by legal and exact evidence which removes "all doubt as to the understanding of the parties. In the "attempt to reduce the (deed) to writing there has been a "mutual mistake, caused chiefly by that party who now

"seeks (to take advantage of that mistake). The writ-
"ten (deed) did not effect that which the parties intended.
"That a court of equity (should) afford relief is, we think,
"well settled by the authorities."

The case at bar is a repetition of the case cited. In both cases the bill was filed to reform a contract; in both cases; the written contract varied from the agreement of the parties; in both cases the appellee acted and made its representations through its agent; in both cases the party making the mistake or misrepresentation sought to take advantage of it; and, as strange as it may seem, in both cases the appellant had to appeal *from* the same court *to* the same court to get relief; and, having furnished the court with a case so exactly similar to the one cited, your Honors will, I know, pardon counsel for indulging in the pleasant hope of receiving the same order in the case at bar.

5. *The court erred in entering against Jno. A. Elliott a deficiency decree.*

The original bill in the case was filed in Superior court Cook county, to reform the deed. Mr. Dickey, owner of the note of $9,000, intervened, saying he had an interest, and asked to be made a party defendant. Appellant was ordered so to do. Then Mr. Dickey filed a cross-bill, and removed the cause to the United States court.

Mr. De Koven had sole charge of the business for Mr. Dickey. Mr. Dickey did not even know, nor did Mr. De Koven know at the time, that Mr. Elliott had accepted the deed with the "assuming" clause in it. Mr. Elliott did not know it, nor did Mr. Hill, Mr. Sackett's agent, know it until nearly a year after. Mr. De Koven did not know of the trade until after it was made. (Page 36.)

There was no privity of contract between Mr. Dickey, the owner of the note, and Mr. Elliott. Their minds had never met. There was no consideration passing from Mr. DeKoven or Mr. Dickey for this additional security furnished by Mr. Elliott. In fact, Mr. Elliott received no consideration *from any one* for such assumption. There was not even a forbearance or extension on the part of Mr. Dickey or Mr. De Koven, his agent, as consideration to Mr. Elliott to assume. It is not claimed that Mr. Elliott ever agreed in writing, over his signature, or by word of mouth, to pay this debt of Sackett's, and now to hold him liable to the owner of the note for Mr. Sackett's debt, seems to us manifestly unjust. But how much more unjust is it to hold that a man, relying on the good faith of those with whom he is dealing, and accidentally, or even carelessly (so long as no innocent party is injured), falls within the harsh rule cited and sustained by the court below, yet he must be held to its strict letter, and not be allowed—though he is able to show by a clear preponderance of proof—to show by every witness who knows any of the facts, but the one seeking to take advantage of it—to show by every document, except one drawn by Sackett, that his even accepting the deed with that clause in it was brought about either by fraud or mistake.

If Mr. DeKoven had, as the agent, after the deed was recorded, gone to the records, and found Mr. Elliott had assumed that note as a part of his consideration in purchase, and on the strength of that and his knowledge of Mr. Elliott's financial standing had bought the note, then there might be some equity in their demand for Mr. Elliott to pay Mr. Sackett's debt. Such, however, is not the case.

It will probably be claimed by counsel for appellees

that Mr. Elliott was guilty of laches, and delay in seeking to reform this deed. Mr. Elliott testifies (page 72) that he "came down (to Chicago) in a few days after "making the discovery, and consulted Mr. Mason, and "he made out the papers; I made the discovery just a "short time previous to consulting Mr. Mason, and start-"ing the suit."

So, as a matter of fact, there was no delay, and even if there had been a few weeks or a few months delay after discovering the error or fraud, no innocent person was prejudiced by such delay. The parties stand just as they did the day the mistake or fraud was perpertrated, and if the deed is reformed it leaves every party to the record, and every one else just as they were on the day the deed was made.

"A party in possession of lands in 1869, filed a bill to "correct a mistake in a description of the land, which "was executed in 1823, and it appeared that the mistake "had been recently discovered. Held that the circum-"stances failed to show any such gross laches or delay in "asserting the party rights as that a court of equity "would refuse to interfere, and in the same case it was "held that complainant was not bound to make out such "a case as would be required of a subsequent purchaser "for a valuable consideration, without notice of a prior "conveyance to overcome the latter."

68th Ill., 128.

Among other cases cited by this court in support of its opinion in the case cited, is that of *Insurance Co.* v. *Wilkinson*, 13 Wall., 222, which we think fully sustains our position in regard to the position which Mr. Hill occupied as the agent of Mr. Sackett. In that case the agent of the

company inserted in the application for life insurance a representation of the age of insured's mother which was untrue, but which the agent himself obtained from a third person, and inserted without the assent of the assured; held, it was the act of the company and did not invalidate the policy, and that to permit verbal testimony to show how this was done by the agent, does not contradict the written contract, though the application was signed by the party. It proceeds upon the ground that it was not his statement, and that the insurance company, by the acts of their agents in the matter, are estopped to set up that it is the representation of the assured.

In the case of *Insurance Co.* v. *Snell*, this court said:

"Of course, oral proof in all such cases is to be received "with great caution, and where the mistake is denied, "should never be made the foundation of a decree variant "from the written contract, except it be of the clearest and "most satisfactory character."

Mr. Elliott did not *sign* any contract, and in an equitable sense this rule should not apply. We are, however, content with the rule, and wish to state briefly where we think we have the proof of the "clearest and most satis- "factory character."

1st. Mr. Elliott swears he never intended or consented to assume; that two contracts were drawn and the first one refused on account of assumption clause.

2d. Mr. Ulm, a wholly disinterested witness, heard the first refusal and testifies to it.

3d. Mr. Hill, whom every witness agrees was Sackett's agent, and who is also wholly disinterested in the result of the case, says that the evidence of Mr. Elliott and Mr. Ulm is true; that he did refuse the first contract and

signed the second upon the distinct understanding that he should not assume the incumbrance.

4th. The contract signed by Mr. Elliott and Mr. Sackett, and which Mr. Elliott relied on, and had the right to rely on, being carried out, sustains the evidence of Messrs. Elliott, Ulm and Hill. It says: "Subject to an "incumbrance of $9,000" (page 5), and does not contain one word, from beginning to end, about assuming one cent by Mr. Elliott.

Opposed to this is Mr. Sackett, one of the real parties in interest, who says he told Hill to get some one to assume it, and that "he depended on Hill" to get some one to assume it. Mr. Hill says he has no recollection of any such conversation.

There is not a single witness or document or circumstance in support of Mr. Sackett's statement that "he so "understood it"; and if there is not clear and overwhelming proof of the intention of the parties, then no case can be conceived where a contract could, as a matter of fact, be reformed, where the party seeking to take advantage of the mistake, simply said, "That is the way I under- "stood it."

We feel confident in this case that we have shown such a case as ought to afford affirmative relief and reform the deed, as prayed in our original bill; that certainly, where the mortgage is asking *affirmative* relief, and we are defending that we have introduced evidence that in any court of equity ought to prevent a decree ordering Mr. Elliott to pay the deficiency after a sale. In other words, it would not require such absolute and convincing proof to refuse to enter a deficiency decree, as it would to reform the deed. In *Davis* v. *Symonds*, 1st Cox, 402, the court says:

"The strongest case has been cited to show this, "namely, where a bill was brought to set aside an agree- "ment, and the court refused to do it, and afterwards a "bill was brought to carry the same agreement into exe- "cution, and the court refused to do it. In cases of this "sort it is often said that the admission of parol evidence "to establish fraud or circumvention, is not so much to "vary the contract as to establish something collateral to "it which shows that it ought not to be enforced."

Seymour v. *Delancy*, 6 Johns. C. C., 322.

In the case at bar, the real question is between Mr. Elliott and Mr. Sackett, and is who shall pay the deficiency decree? If Mr. Elliott pays it, it is for his (Sackett's) benefit. If he does not pay it, it is Mr. Sackett's loss. We filed the bill asking to reform the deed. Mr. Sackett answered, simply denying the allegations of the bill. Mr. Sackett filed no cross-bill, nor did he in his answer, even ask by way of cross-bill, for affirmative relief, asking that Mr. Elliott pay to him whatever deficiency he should have to pay. Notwithstanding that fact, the court below entered a decree for the protection of Mr. Sackett, saying he should have leave in case he paid any deficiency or any part of said indebtedness to apply to the court, on notice, "for further order at the foot of this de- "cree, requiring said Elliott to repay to said Sackett the "sum so paid on said indebtedness." Thus the court below in its anxiety to prevent the changing of a written deed by parol, and also by evidence in writing, signed and sealed by the parties (as was the contract), entered a decree enforcing that part of the contract, which was a fraud—a legal fraud, at least—even though the real party in interest, Mr. Sackett, did not invite the court by bill or cross-bill to relieve him.

True, Mr. DeKoven, as trustee, asks, in order to take advantage of the circumstance, and have an innocent man who has been trapped in to receiving and recording the deed, help him to make good to his principal, Mr. Dickey, the loss that might otherwise occur by reason of an injudicious loan to Mr. Sackett, that a decree be rendered against Mr. Elliott "for any balance of money that may "be found due and owing" him over and above the proceeds of the sale, and the court ordered the master to report the deficiency to the court.

In short, the only real decree against Elliott is in favor of Sackett, who was the only one entitled to ask for affirmative relief, and he is the one who made no application to the court for relief, but simply asks to be dismissed with his costs, &c. We think this contrary to all rules in a court of equity, and an error by the court below.

Miner v. *Hess*, 47 Ill., was a bill to reform a lease. The court agrees with the law as laid down by this court, that the evidence to reform written contract must be clear and satisfactory, leaving but little, if any, doubt of the mistake, and reforms a part of the lease as prayed by complainant, and refuses to reform as prayed by defendant, because of a fair and even conflict of evidence; and says at the close:

"Besides, as the record stands, we could not under the "long established rules of practice in such cases, grant "the relief asked by appellant, as her claim rests alone "upon her answer, which she has not made a cross-bill."

We will be frequently reminded of the fact, no doubt, by counsel, that Mr. Elliott accepted the deed and recorded it, and that it is therefore binding.

Let us review the circumstances for a moment. Hill,

as Sackett's agent, had changed the written contract to agree with his verbal agreement with Hill. When the deed was handed him, he (Elliott) was sick.

Mr. Elliott says (page 70):

"Mr. Ulm took the deed to the recorder's office."

Mr. Ulm says (page 58):

"Mr. Elliott came in complaining of being unwell, and "wished I would take it to be recorded, and I did so."

For years before, as the record shows, Mr. Elliott had been very active in business and political life. For six years auditor of the State of Iowa; land commissioner of Des Moines Valley Railroad Company; vice-president and cashier Citizens' National Bank, at Des Moines; and at the time his evidence was taken, was president of the State Insurance Company. (page 60.)

Mr. Elliott says:

"During that time for two or three years, I have been "out of business. I was affected with pressure on the "brain, so that I had to quit all business."

Mr. Somers: "Proprietor of Turkish bath institute "at Grand Pacific Hotel. Not a regular physician. Been "in this business thirteen years. Know Mr. Elliott. "Treated him about three months. I have studied "medicine at Rush Medical College. I attended two "courses besides studying elsewhere, still I am not a reg-"ular graduate.

"Q. And you have made it your business specially, "you say, for the last thirteen or fourteen years?

"A. Yes, sir; in fact ever since I came out of the

"army, and I had experience in the hospitals in the army.

"Q. What was Mr. Elliott's condition, so far as you "can tell?

"A. When Mr. Elliott came to me he was suffering "with cerebral congestion. I do not think, sir, at that "time that there was any breaking down of the brain "structure; if there was it was very slight. I do not "think there was, though he was in a fair way to have "such a condition take place. He suffered at that time "with pressure in the brain, both at the base of the brain "and on top of the head; with neuralgic pains, extending "over the left temple, and with dizziness, especially so on "rising or if anything disturbed him; he had dullness, es- "pecially after meals; fullness in the head, particularly "after meals; a tendency to the accumulation of gas, and "also a loss of memory. I know so much so—there was "so much tendency to confusion, and a lack of power to "concentrate thought. I advised him very strongly not "to undertake any business at all, and what business he "did do he did against my advice, for I advised him very "specially at that time that he was not in a condition to "do business. He was in a condition where a mental "effort would be likely to prove fatal. There was also, "if I remember, at that time a wavering of his gait, an "unsteadiness of the limbs, indications, all of them, tend- "ing very strongly to show a severe condition of brain "congestion—cerebral congestion. There was at times "a lack of action and at times an increased activity of "the brain, so much so as to produce an intense dis- "tress. During those times he was unable to concen- "trate his mind at all—rather absent-minded. I know "in talking to me sometimes it was difficult for me to "get such an answer as I wished from him without re-

"peating the question once or twice. I spent a great "deal of time with Mr. Elliott. His case was a critical "one, and he was a prominent man at that time. Per- "haps all physicians are apt to spend a great deal of "time, and I took a great interest in his case on ac- "count of the peculiar circumstances, and he had been "receiving treatment from others previous to coming to "me; perhaps as much so as anything else because, I "think, he had been given to understand at that time "that perhaps I could not treat him as successfully as "some others, and I know he questioned me very closely "before I commenced treating him at all, in reference "to his case; very closely. I think as much so as any "person I ever had before me. He was suffering at "that time with pain in the left side.

"Q. When he was suffering from those attacks of "pressure on the brain, was he or not apparently in a "condition to observe and take in everything that was "going on around him, or was he oblivious?

"A. Partially so; at times he was and at times he "was not. There were times when he seemed to be "better than others. It is just as I say, if anything "came up that disturbed him, anything in a business "way; for instance, while I was treating him, two or "times he undertook to do some business, and returned "to me the next day for his treatment at the hour ap- "pointed very much worse than on the day previous. "That I attributed to his effort to do business, and I cau- "tioned him then very strongly against doing it. What "he did do, if anything, he did against my advice. Any "one would advise the same in his condition. Any med- "ical gentleman that knows what the conditions of con- "gestion are, or what the results are likely to be where "not checked."

Mr. Somers, on cross-examination, shows that he does not remember exactly when he treated Mr. Elliott, but Mr. Elliott remembers that at the time he was making the trade he was "very unwell at the time. I was laboring "under what was called a pressure of the brain. I was "taking electric baths."

Notwithstanding Mr. Elliott's condition he glanced over the deed, saw it was the "Calumet property, and "that it was 'subject' to the mortgage or incumbrance. "I did not read that part of the deed which says I 'as- "sumed and agreed to pay' as a part of the considera- "tion for this property. I would never have received it "so. That was not according to my understanding with "Mr. Hill, and I had refused the contract on that very "ground." It may strike the court strange that Mr. Elliott read the part which said "subject to," and did not read the assuming clause. If the court will examine the deed it will readily see how it happened. The deed says (page 6): "This deed is made subject to a trust "deed." Then follows a long description in writing of the incumbrance. In fact nearly a folio of description before it says a thing about the assuming of the debt. This would be apt to mislead any one, especially in Mr. Elliott's condition; sick and relying on his conversations and contract with Mr. Hill, and we respectfully insist that if Mr. Elliott had taken the deed, and without even glancing at it, had handed it to Mr. Ulm for record, still such want of care on his part would not enable any one (unless an innocent purchaser of the note, for value, to compel a performance on his part of the conditions in that deed, when it is so clearly shown that he never agreed to do anything of the kind. True it is, that Mr. Sackett (party defendant) in his answer says that "El-

"liott deliberately and carefully read over said deed in the "office of said Henry L. Hill at the time of the delivery "of the papers in said transactions, being fully aware of, "and noting especially, as this defendant believes from his "best recollection, said clause in said deed, which com- "plainant now desires shall be expunged, changed or "avoided."

But then Mr. Sackett (witness) does not make such a clear case.

"Q. Now, Mr. Sackett, at the time you handed this "deed to Mr. Elliott, do you say that he read the deed "clear through?

"A. *I don't know.* Mr. Elliott took up the deed. I "*suppose* he did, of course; that is my impression. A "man naturally would. I could not say. He did not "read it aloud, and of course I could not tell. He had it "a sufficient time to read all the written parts."

And Sackett (witness) contradicts Sackett (defendant) by saying that he "never had any talk with Elliott about "that liability;" and can any one believe it possible that Mr. Elliott and Mr. Sackett, at the time of delivering deeds, could have come to an amicable arrangement about that $9,000 liability, after all the trouble and talk about it between Elliott and Hill, without having some conversation about it? So, then, it is true that at the time of the passing of the deeds between Mr. Elliott and Mr. Sackett—for Mr. Elliott so states, and Mr. Sackett (as witness) admits the truth of what he says—Mr. Sackett and Mr. Elliott did not say a word about that liability, and it is not strange the effect that it had on Mr. Elliott, when he discovered the mistake. He says (page 72): "I was in our sitting room, looking "over some papers, sorting them

"out, and when I made the discovery I came near faint-
"ing. My wife and daughter helped me out on the porch.
"It was some time before I recovered."

The court can thus easily see the condition of Mr. Elliott at the time he accepted the deed. The most that can be said is that he was careless. Yet we respectfully insist that it was no such want of care that any one could take advantage of, unless they could show the court they had been deceived by the act.

In Conclusion.

We hope for a decree in this court directing the court below to enter a decree correcting the deed from Mr. Sackett to Mr. Elliott, by striking out the clause by which Mr. Elliott assumed and agreed to pay the $9,000 note of Mr. Sackett's, or, at least, to amend the decree so that it will not compel Mr. Elliott to pay to Mr. Sackett, or any one else, the deficiency after sale of the property in question.

We expect the court to find from the facts that Mr. Sackett knew when he drew the deed that Mr. Elliott did not intend to assume the incumbrance. Or, if the court find that his agent had violated his instructions, and in so doing had deceived Mr. Elliott, then we expect, as a matter of law, that this court will find that Mr. Sackett, having accepted the consideration which Elliott agreed with Hill to pay, and having made Mr. Hill his agent, and taken advantage of that agency whenever and wherever advantages occurred, the agreements and representations

of his agent were as though made by him, and are binding upon him.

We hope this court will sustain its former sound rulings, that a written contract (even when signed by the parties) may be varied, changed or reformed by parol evidence, where there is a clear and overwhelming preponderance of proof, and where fraud or mistake is charged.

We expect this court to hold that another instrument, than the one in controversy, if under the hand and seal of the parties to the instrument in controversy, and was the foundation for the instrument in controversy, may be read and considered in evidence, to give construction to the instrument in controversy, where there is a charge of fraud or mistake, and that it is not a proper nor a just rule for a court of equity to say, the last instrument is the best and conclusive evidence of the intention of the parties, especially when the instrument desired to be introduced attempts to and does lay down the terms and agreements upon which the last instrument is founded. This especially ought not to be the rule where the instrument sought to be introduced is a contract, dignified with the hand and seal of both the parties, and the last instrument is signed by but one of the parties.

We expect this court to find, as a matter of fact, that Mr. Sackett never told Mr. Hill he must get some one to assume the incumbrance, but if true, we expect the court to find, as a matter of law, that a principal cannot employ an agent, give him secret instructions unbeknown to the party with whom he is dealing, and then if his agent violates his private instructions, hold an innocent party to the performance of a contract which was procured by his agent violating his private instructions.

With an apology to the court for the length of my brief, and for the lack of system, which the press of other work has prevented, I very respectfully submit the cause of my client into the hands of this honorable court.

WM. E. MASON,
Sol'r for Jno. A. Elliott.

WALLACE, MASON & MEDBURY,
Of Counsel.

OFFICE SUPREME COURT U. S.
FILED
NOV 11 1882
JAMES H. McKENNEY, Clerk.

108-132

SUPREME COURT of the UNITED STATES,

OCTOBER TERM, A. D. 1882.

JOHN A. ELLIOTT, *Appellant*,
v.
GEORGE A. SACKETT AND HUGH T. DICKEY, *Appellees*.

Appeal from the United States Circuit Court for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLEES.

EDWARD G. MASON,
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SUPREME COURT of the UNITED STATES,

OCTOBER TERM, A. D. 1882.

JOHN A. ELLIOTT, *Appellant*,
v.
GEORGE A. SACKETT AND HUGH T. DICKEY, *Appellees.*

Appeal from the United States Circuit Court for the Northern District of Illinois.

STATEMENT.

John A. Elliott filed a bill in the Superior court of Cook county, Illinois, to re-form a deed, executed to him by one George A. Sackett, by striking out a clause whereby Elliott assumed and agreed to pay an indebtedness secured on the premises conveyed. Hugh T. Dickey, the holder of the indebtedness, was made a party and removed the cause to the Circuit court of the United States for the Northern District of Illinois, where he filed a cross-bill to foreclose the trust deed securing his debt, and to obtain a decree against Sackett and Elliott for the payment of the same. At the hearing, the court entered a decree dismissing the original bill, sustaining the cross-bill and directing the payment of the debt by Sackett and Elliott, or one of them, and ordering a sale of the premises. From this decree Elliott appealed to this court.

Brief of the Argument.

I.

It must appear that a contract is different from the intention of *both parties* to justify a court of equity in reforming it. The deed complained of is exactly in accordance with the intention of Sackett, one of the parties to it.

Story's Equity Jurisprudence, 11th Edition, p. 144, Sec. 138, K. note.
Schettiger v. *Hopple*, 3 Grant's Cases, 54.
Nevins v. *Dunlap*, 33 New York, 676.
Coffing v. *Taylor*, 16 Illinois, 457.
Ruffner v. *McConnell*, 17 Illinois, 217.
Sutherland v. *Sutherland*, 69 Illinois, 488.
Snell v. *Insurance Company*, 98 U. S., 89.

II.

A court of equity will only re-form a contract *upon the clearest and most convincing proof of mistake.* No such proof is found in this record.

Story's Equity Jurisprudence, 11th Edition, pp. 157, 161, Sections 152 and 157, and cases cited.
Schettiger v. *Hopple*, 3 Grant's cases, 58.
Nevins v. *Dunlap*, 33 New York, 680.
Edmunds Appeal, 59 Penn. State Rep., 220.
Ruffner v. *McConnell*, 17 Illinois, 217.
Hunter v. *Bilyeu*, 30 Illinois, 228.
Sutherland v. *Sutherland*, 69 Illinois, 488.
Ivinson v. *Hutton*, 98 U. S., 82.
Snell v. *Insurance Co.*, 98 U. S., 90.

III.

The weight of the evidence shows that *no mistake at all was made* in the deed from Sackett to Elliott.

A. The evidence of the deed is not overcome by that of the preliminary contract, even if they differ.

Story's Equity Jurisprudence, 11th Edition, page 164, Sec. 160, and cases cited.

B. Sackett's testimony as to what the agreement was, is practically uncontradicted, and is confirmed by the other witnesses.

C. Elliott's own conduct shows that he regarded the contract as one of assumption:

D. The proof in favor of mistake is exceedingly weak.

E. The deed properly expresses the legal effect of the contract. A purchaser taking a deed "subject to," an incumbrance, the amount of which is deducted from the purchase price, becomes personally liable for the same.

Comstock v. *Hitt*, 37 Illinois, 549.
Fowler v. *Fay*, 62 Illinois, 377.

IV.

If Elliott made any mistake, it was one of law and not of fact, from which a court of equity will not relieve him.

Hunt v. *Rousmaniere's Administrators*, 1 Peters, 16.
Bank of U. S. v. *Daniel*, 12 Peters, 33.
Sibert v. *McAvoy*, 15 Ills., 109.
Wood v. *Price*, 46 Ills., 441.
Snell v. *Insurance Company*, 98 U. S., 92.

V.

Even where the minds of the parties have never met, courts of equity do not interfere where there was gross negligence on the part of the plaintiff in falling into the error or in not sooner claiming redress, which is the case here.

Story's Equity Jurisprudence, 11th Edition, p. 143, Sec. 138 *i.*

Graves v. *Boston Marine Insurance Co.*, 2 Cranch, 444.

Grymes v. *Sanders*, 93 U. S., 61.

Snell v. *Insurance Co.*, 98 U. S., 90.

VI.

Nor do courts of equity interfere where intervening rights have accrued, or where the parties cannot be placed *in statue quo.* Both objections exist in the present case, and appellant makes no offer to restore matters to their former position.

Story's Equity Jurisprudence, 11th Edition, p. 143, Sec. 138. i,

Grymes v. *Sanders*, 93 U. S., 62.

New Orleans v. *Montgomery*, 95 U. S., 19.

Adams v. *Stevens*, 49 Maine, 362.

ARGUMENT.

I.

IT MUST APPEAR THAT A CONTRACT IS DIFFERENT FROM THE INTENTION OF BOTH PARTIES TO JUSTIFY A COURT OF EQUITY IN RE-FORMING IT. THE DEED COMPLAINED OF IS EXACTLY IN ACCORDANCE WIFH THE INTENTION OF SACKETT, ONE OF THE PARTIES TO IT.

The appellant complains of the decree below, because it dismissed his bill praying for a reformation of the deed from Sackett to himself, by striking out the clause whereby he directly assumed and agreed to pay the incumbrance on the premises conveyed, as part of the consideration as purchase price thereof. This clause remaining unaffected, there can be no question as to the propriety of the decree entered upon the cross-bill adjudging Elliott to be liable for the amount of the incumbrance.

Elliott's bill was distinctly and in terms a bill to reform the deed in question and the record thereof, by striking out and expunging the language aforesaid. (Printed Record, page 4.) But before a court of equity would be justified in so reforming any contract, it must appear that the language used *differs from the intention of both parties.*

The Supreme court of Pennsylvania says in regard to a bill for the correction of a deed: "The chancellor "would have to be satisfied that *the mistake was on both* "*sides;* for if it be by one party only, the altered instru-

"ment will not express the intention of both. A mistake "on one side may be a ground for rescinding a con- "tract, or for refusing to enforce its specific execution, "but it cannot be a ground for altering its terms. Ad- "ams' Eq., 411."

Schettiger v. *Hopple*, 3 Grant's cases, 54.

So, too, the court of appeals of New York says: "To "entitle a party to the decree of a court of equity reform- "ing a written instrument, he must show * * that "the material stipulation which he claims should be omit- "ted or inserted, was omitted or inserted *contrary to the* "*intention of both parties*, and under a *mutual mistake*. It "is not enough to show that he made a mistake himself; "that, through inadvertence and error on his part, he "executed an instrument, the stipulations of which do not "express what he intended. He must also show that the "other contracting party labored under a similar delusion. "The rule is well expressed by Chief Justice SPENCER, "in delivering the opinion of the Court of errors in *Ly-* "*man* v. *The Utica Insurance Co.*, 17 Johns., 373. 'It is "not enough, in cases of this kind, to show the sense and "the intention of one of the parties to the contract. It "must be shown incontrovertibly that the sense and in- "tention of the other party concurred in it; in other "words, it must be proved that they both understood the "contract as it is alleged it ought to have been, and in "fact it was, but for the mistake. It would be the height "of injustice to alter a contract on the ground of mis- "take, when the mistake arises from misconception of one "of the parties, in consequence of his imperfect explana- "tion of his intentions. If it be clearly shown that the "intention of one of the parties is mistaken and misrepre- "sented by the written contract, that cannot avail unless

"it be further shown the other party agreed to it in the "same way, and that the intention of both of them was, "by mistake, misrepresented by the written contract.'"

Nevins v. *Dunlap*, 33 N. Y., 676.

And the decisions of the Supreme court of Illinois are to the same effect.

"Equitable jurisdiction to correct mistakes does not "extend to mistakes in the intention of one of the parties, "and without fraud in the other. (*Coffing* v. *Taylor*, 16 "Ill., 457.)"

Ruffner v. McConnell, 17 Ill., 217.

"Rectification can only be had where both parties have "executed an instrument under a common mistake, and "have done what neither of them intended. A mistake "on one side may be ground for rescinding, but not for "correcting or rectifying an agreement." Citing Kerr on Fraud and Mistake, 422; 1 Story's Eq. Jur., Sec. 152 *et seq;* Fry on Specific Performance of Contracts, Sec. 505.

Sutherland v. *Sutherland*, 69 Ill., 488.

And in a recent case in this court, where an insurance policy was reformed so as to express the contract really entered into, the whole decision is based upon a *mistake of both parties*. The court said: "We have before us a "contract from which, by mistake, material stipulations "have been omitted, whereby the true intent and meaning "*of the parties* are not fully or accurately expressed. A "definite concluded agreement as to insurance, which, in "point of time, preceded the preparation and delivery of "the policy, is established by legal and exact evidence, "which removes all doubt as to the understanding of the

"parties. In the attempt to reduce the contract to writing "*there has been a mutual mistake.* * * The written "agreement did not effect that which the parties intended. " * * * It would be a serious defect in the jurisdic- "tion of courts of equity if they were without the power "to grant relief against fraud or *mutual mistakes* in the "execution of written instruments."

Snell v. *Insurance Co.*, 98 U. S., 89.

In the case at bar, it is plain, from the record, that the deed sought to be reformed does express the intention of Sackett, one of the parties, and there is no mistake on his part. In his answer to the original bill, he states that he authorized Hill to act as his agent in the sale of the premises, Hill being fully informed of the $9,000 incumbrance; that Sackett, because of his advanced age and retirement from business, desired to be released from all liability to pay the same, and that it was Sackett's desire and peremptory request that the purchaser should especially covenant to assume and pay the incumbrance. He avers that he solicited Elliott to assume and agree to pay the $9,000 incumbrance, and denies that he refused to do so, and insists that the deed correctly expresses the agreement of the parties, and solemnly and upon his oath denies all deceit, fraud or misrepresentation, and says that at the time of the transaction said incumbrance was considered to be and was a part of the purchase price thereof, and denies that there was any understanding different from the covenants in the deed. (Printed Record, pp. 18 and 19.)

And Sackett testifies as follows:

"I instructed Hill to sell the property subject to the in- "cumbrance, so as to free me from all liability. * * *

"That was the authority he had. * * * He never "said anything to me about Mr. Elliott refusing to assume "the liability, for I never should have sold the property "without he had, never; and that was my terms to him, "and my idea throughout; and I made out the deed the "same way. * * * I never had any conversation "between Mr. Elliott and myself in regard to that liabil- "ity. I depended on Mr. Hill, as my agent, in fixing "that thing according to my instructions. * * * "After the acceptance of his proposition (as to land at "Evanston and in Iowa), we met together, in the office, "and passed our deeds to each other. I handed the deed "which I wrote to Mr. Elliott myself. He took it and "read it and I took his. * * * If Elliott had not "assumed the incumbrance, we should not have had any "trade. I should not have passed the property; my ob- "ject, I being an old man, did not want to have these "things hang over. I never sell a piece of property oth- "erwise than to a party who assumes the incumbrance, "and never would. (Printed Record, pp. 41, 42, 47.)

John De Koven, agent for Dickey, the holder of the incumbrance, testifies that Sackett told him that Elliott had assumed this incumbrance, and that he sold the property and got Mr. Elliott to assume it, for the purpose of protecting him, *i. e.*, Dickey. And this may have been at or about the time the trade was made. (Printed Record, pp. 32, 34 and 39.) This shows what Sackett's intention and understanding was.

Henry L. Hill, the real estate broker, who made the negotiation, testifies that Sackett gave him the amount of the incumbrance, and *he was to trade it with that upon it.* He does not recollect any specific instructions about it.

But he presented a contract to Elliott by which he was to assume the incumbrance. Why should he do this, unless so instructed by Sackett? (Printed Record, p. 73.)

John A. Elliott, the appellant, testifies that he never talked with Sackett about the agreement, the negotiations were all with Mr. Hill, who first presented him with a contract by which he assumed the incumbrance. (Printed Record, pp. 60 and 61.)

There is no proof or pretense of fraud or imposition or deceit on the part of Mr. Sackett. His testimony as to his understanding and intention is confirmed by the evidence of De Koven to whom he stated it, probably at the time the sale was made. It is confirmed by Hill, who admits that his instructions were to trade the property with the incumbrance upon it, and that he drew and presented a contract to Elliott by which he was to assume it. And it is not contradicted by Elliott, who confirms Hill as to the contract first presented to him. It is manifest, therefore, that Sackett's intention is exactly expressed in the deed, by which Elliott assumed and agreed to pay the incumbrance. As the contract, therefore, which is sought to be reformed does not differ from the intention of one of the parties to it at least, a court of equity would not be justified in making any alteration in it. And the decree of the Circuit court refusing to take such action and dismissing the bill was just and proper, and should be affirmed.

II.

A COURT OF EQUITY WILL ONLY REFORM A CONTRACT UPON THE CLEAREST AND MOST CONVINCING PROOF OF MISTAKE.

Story's Eq. Jur., 11th Edit., pp. 157 and 161; Sections 152 and 157, and cases cited.

"To overcome evidenee of such dignity and worth as "a written instrument affords, paroi proof ought to come "as near to absolute demonstration as any moral propo- "sition can be brought, and hence chancellors every- "where, while asserting jurisdiction to reform deeds, "have demanded a clearness and fulness of proof to jus- "tify the exercise of so extraordinary a power, which in "practice have amounted to an almost total abnegation of "the power itself."

Schettiger v. *Hopple et al.*, 3 Grant's Cases, 58.

"To entitle a party to the decree of a court of equity "reforming a written instrument, he must show a plain "mistake clearly made out by satisfactory proofs. When- "ever the evidence is loose, equivocal or contradictory, "or is in its texture open to doubt or opposing presump- "tions, the relief will not be granted. This proposition "is obvious because the written instrument, carefully "and deliberately prepared and executed, is evidence of "the highest character, and will be presumed to express "the intention of the parties to it, until the contrary ap- "pears by clear, positive and unequivocal evidence."

Nevins v. *Dunlap*, 33 N. Y., 680.

The cases all agree that the proof, to justify the reforming a deed, must be such as to strike all minds alike, as free from all reasonable doubt.

Edmunds' Appeal, 59 Penn. St., 220.

So, too, the Illinois cases hold the same doctrine.

"We recognize a mistake, in fact, as a ground for "equitable jurisdiction; but relief will only be granted "upon clear and satisfactory proof of the mistake in fact."

Ruffner v. *McConnell*, 17 Ill., 217.

"Parol evidence may be resorted to for the purpose of "proving what was the real contract of the parties, but "the strongest and most convincing proof will be required "before the common law rule is postponed and the power "exercised by the court."

Hunter v. *Bilyeu*, 30 Ill., 228.

"Where a party seeks to rectify a written instrument "on the ground of mistake, the rule is, the evidence must "be such as to leave no fair and reasonable doubt upon "the mind that the instrument does not embody the final "intention of the parties."

Sutherland v. *Sutherland*, 69 Ill., 488.

If the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief upon the ground that the written paper ought to be treated as a full and correct expression of the intent until the contrary is established beyond reasonable certainty.

Ivinson v. *Hutton*, 98 U. S., 82; citing

Gillespie v. *Moon*, 2 Johns (N. Y.), Ch., 585.

Rhode Island v. *Massachusetts*, 15 Peters, 271.

Daniel v. *Mitchell*, 1 Story, 172.

Of course, parol proof in all such cases is to be received with great caution, and where a mistake is denied should never be made the foundation of a decree, variant from the written contract, except it be of the clearest and most satisfactory character.

Snell v. *Insurance Co.*, 98 U. S., 90.

In fine, the rule, as laid down by Story, is fully justified by the decisions, and that rule is that the distinction in regard to the measure of proof in such cases is much the same which exists between civil and criminal cases, or that distinction which is expressed by a fair preponderance of evidence and full proof.

Story's Eq. Jur., 11th Ed., page 161, Section 157.

We assert with confidence that no such proof as this can be found in this record. Taking the whole of the testimony together and putting upon it the construction must favorable to appellant, it is entirely consistent with the theory that even if Elliott had not intended to assume the incumbrance before the parties met, when he saw by the deed that Sackett was still determined, as he knew he had been from the first, to have him assume the incumbrance, he decided to do so and take the risk, knowing, as he says, that there was some trading value in the property. (Printed Record, page 63.) The proof under the rule above laid down must be such as to exclude every hypothesis but that of mistake. It does not all exclude this theory, which reconciles all of the evidence, and therefore, there was nothing to justify the action asked for from the court below. Its refusal to so act was right and proper, and should be approved.

III.

THE WEIGHT OF THE EVIDENCE SHOWS THAT NO MISTAKE AT ALL WAS MADE IN THE DEED FROM SACKETT TO ELLIOTT.

It is not a forced deduction from the testimony that Elliott in fact agreed to assume the indebtedness in question. On the contrary, the weight of the evidence clearly and strongly shows that no mistake at all was made in the deed, not even as to Elliott. We have shown what Sackett's intention was, and we insist that Elliott's was the same.

A.

THE EVIDENCE OF THE DEED IS NOT OVERCOME BY THAT OF THE PRELIMINARY CONTRACT, EVEN IF THEY DIFFER.

The language of the deed is strong presumtive evidence of the meaning of both parties to the contract. It is a written instrument under seal, the highest form of proof. And it plainly recites, not simply that Elliott "*assumed*" the incumbrance, which would have been amply sufficient to make him liable for it, but that he "*agreed to pay the same*," and furthermore, that he did this "*as part of the consideration of the conveyance as purchase price.*" It is urged against the deed that the preliminary contract between the parties, as it is alleged, differs from it in this respect. But the evidence furnished by the deed cannot by any means be overcome by that of the preliminary contract, even if there be a difference between them.

"In case of preliminary written instruments it must be "plainly made out that parties meant in their final instru- "ments merely to carry into effect the prior contract. "As parties are at liberty to vary original agreement, if "the circumstances of the case lead to supposition that "new intent has supervened, there can be no just claim "for relief upon the ground of mistake. The very cir- "cumstance that final instrument differs from preliminary "one affords some presumption of intentional change. All "antecedent propositions are deemed merged in the writ- "ten contract."

Story's Equity Jurisprudence, 10th Edit., Sec. 160, and cases cited.

Unless, therefore, it be plainly made out that the parties here meant in their deed merely to carry into effect the prior contract, the fact of a difference between them, if there be one, is no evidence of mistake. On the contrary, it tends to establish the correctness of the deed. But it appears here, from Sackett's testimony, that but little attention was paid to the preliminary contract, and that their final transaction was made without reference to it. Sackett testifies that he did not have the contract before him when he drew the deed, and that he did not know that the contract contained no clause of assumption. He did not pay much attention to the contract. He took it that the contract was merely a paper that Mr. Hill wanted to insure his commissions. He did not consider the contract as amounting to anything, and is not even certain that he signed it. But if he did sign it, his whole object was to have that incumbrance assumed. (Printed Record, page 48). And Mr. Elliott simply testifies that three or four weeks after the execution of the contract he received the deed. (Printed Record, page 62). He

does not pretend that the deed was compared with the contract, or that the contract was produced at the final transaction, or that this was in any sense a mere carrying out of a prior agreement. Upon such proof the strong presumptive evidence which the deed affords cannot be shaken.

B

SACKETT'S TESTIMONY AS TO WHAT THE AGREEMENT WAS, IS PRACTICALLY UNCONTRADICTED, AND IS CONFIRMED BY THE OTHER WITNESSES.

We have already shown how strong the evidence is as to Sackett's own intention and understanding, repeatedly asserted by him, and really supported by what both Hill and Elliott testify to. Now, as to the facts which show Elliott's intention and understanding, the record is nearly as conclusive. Sackett swears that they met together in the office and passed their deeds to each other; that he handed the deed in question to Elliott himself, and that Elliott took it and read it. * * He doesn't know that Elliott read it clear through, but that is his impression. Elliot picked up the deed and was some time in looking it over; sufficient time to read all the written parts of the deed. He made no objection to the wording or to assuming the incumbrance. This was prior to March 10, 1866, this suit was commenced April 28, 1877, between those dates the parties met repeatedly, and Elliott at no time made any reference to the deed. (Printed Record, 42, 47 and 48.)

Hill testifies that Elliott and Sackett came into his office; each had their own deeds and made them and

examined them in his office. (Printed Record, 74.) And Elliott admits that Sackett handed him the deed and he looked at it; and further testifies that he got the deed himself from the recorder's office, about the middle of April, 1876, and that he saw Sackett afterwards, but never called his attention to anything wrong about the deed. (Printed Record, 68, 70 and 71.) These facts all work together to show that Sackett was correct, when he said that Mr. Elliott reading over that deed could not fail to see the object, and right in his belief that Mr. Elliott considered it a good bargain, and probably that was the reason that he made no objection to the wording or to assuming the incumbrance. (Printed Record, 47.)

C.

ELLIOTT'S OWN CONDUCT SHOWS THAT HE REGARDED THE CONTRACT AS ONE OF ASSUMPTION.

Not only does Elliott's conduct at his meetings with Sackett show that he regarded the contract as one of assumption on his part, but his other acts lead to the same conclusion. He computed the part of the interest which Sackett had to pay to the date of the purchase, and took a note for it, undertaking himself to meet the interest when due. (Printed Record, p. 70.) He paid the interest due under the incumbrance in May, 1876, in person. He paid the coupon due in November, 1876, and paid the insurance, as required by the terms of the trust deed securing the debt. (Printed Record, pp. 30, 40 and 53.) In every respect he placed himrelf in Sackett's shoes as to this debt, and evidently understood that he was responsible and liable for it, as his letter to DeKoven also shows.

(Page 40.) And he did not think of attempting to reform the deed until more than a year afterwards, when the property was declining in value.

D.

THE PROOF IN FAVOR OF MISTAKE IS EXCEEDINGLY WEAK.

It appears that the complainant, Elliott, was auditor of the State of Iowa from January 1, 1865, to January 1, 1871. His duties were to examine and audit all accounts against the State of Iowa, and to draw drafts on the treasurer. The last year he was in office he became land commissioner of the DesMoines Valley Railroad, and held that agency for over two years. His duties were to appraise the lands and make sales of them. They had some four hundred thousand acres of land, a large portion of which he sold. He gave memoranda of the description of the lands and amounts to the trustees, who drew the deeds, and he examined the deeds to see if they were correct. He became vice-president and cashier of the Citizens National Bank of DesMoines, Iowa, in 1871, and resigned in 1874. In 1872 he was elected president of the State Insurance Company; resigned in 1874, and was re-elected in 1877. From March, 1875, to March, 1876, he resided in Chicago, and was engaged in real estate operations, buying one house in the neighborhood of the property in question, trading for others, having an office in the city and employing a real estate agent to sell properties for him. And during this period occurred the transaction with Sackett. He was familiar with the supposed distinction between the words "subject to" and "assume," had quite frequently discussed the question

with Mr. Ulm, who had an office with him, and "they "had submitted it to several legal minds and talked it "around." (Printed Rec., pp. 65, 66 and 67.) Now it is simply incredible that a man of such business experience and training, an expert in all matters of finance and real estate, who had taken legal advice upon the very point in question, should have been deceived or mistaken as to the contents or meaning of this deed. There was no imposition or fraud used. He had ample opportunity to inform himself as to its language, and he must be presumed to have known and assented to it. His bare statement that he did not assume the incumbrance cannot avail against his own record as a business man and his record in this case.

His plea of ill health cannot avail him. If he was competent to make a contract "subject to" an incumbrance, he was competent to make a contract "assuming a mortgage." If he was well enough to draw his own deeds of property conveyed by him in the transaction, he surely was well enough to examine the deed drawn by Sackett of the property conveyed by him. And the testimony of Sackett and of Hill show that he was quite well enough to do business at the the time of this transaction. Sackett says Elliott appeared as he has always seen him on the day they exchanged deeds. He saw no difference. He always appeared competent to transact business. There was no special appearance of ill health or absence of mind or want of concentration of mind on this occasion. Mr. Hill says Elliott himself drew his own deeds to Sackett, and he did not notice anything out of the way with regard to his bodily health. (Printed Rec., pp. 42, 43, 74 and 77.)

And the whole evidence of Ulm and of Elliott himself

goes to prove him sufficiently sound in mind during this period to attend to matters more complicated than this. Furthermore, the medical witness Somers, whose testimony was taken to show Elliott's physical and mental condition, swears that he began to treat him nearly a year before he returned to Iowa, and that at the end of the three months he was materially benefited. (Printed Record, page 81.)

Elliott's deposition shows that he returned to Iowa, March 15th, 1876, (page 67), or just after this trade was closed. It follows, therefore, that nearly nine months before it took place he had been materially benefited as to his ill health, and must have been in good condition at the time. But finally Elliott himself does not in fact testify that the state of his health caused the alleged mistake. His language is "Mr. Sackett handed me the deed and I "looked at it far enough to see that it gave the descrip- "tion and that it was subject to the mortgage; I did not "assume the mortgage. Then came a lengthy descrip- "tion of the mortgage *which I did not take time to read.* "I supposed at the time that Mr. Hill had written that "deed, and *I knew that he promised to make the deed* "*right.* I was very unwell the morning I received that "deed."

Plainly it was not his ill health, but his failure to read the deed and his reliance upon Hill that led him into a mistake, if any he made. And the whole of the testmony as to his mental and physical condition may, therefore, be laid out of the case.

Three persons only in this matter were in a position to know whether or not any mistake was made. These were Sackett, Elliott and Hill. It has been already made ap-

parent from Sackett's testimony that there was positively no mistake on his part, and probably none on the part of Elliott. And from Elliott's own testimony and that of others as to his acts and condition it has been shown to be almost incredible that he committed any mistake. Let us examine for a moment the testimony of the third witness, Hill. He states that he received the property from Sackett with the amount of the incumbrance, and he was to trade it with that upon it. He does not recollect any specific instructions about the party whom he traded to assuming the incumbrance. He did, however, first draw and present to Elliott a contract stating in terms that he was to assume the incumbrance, and Elliott refused it on that account. Hill then wrote the contract which is in evidence and made it subject. Elliott bought the property subject to the incumbrance, instead of assuming it; he bought it subject to it as the contract specifies. * * Hill did not draw the deed in question, nor read it before it was given. The parties came into his office, each had their own deeds and made them and examined them in his office; he did not make the deeds on either side. (Printed Record, pp. 73 and 74.)

It will be noticed that there is nothing whatever in this testimony in conflict with the theory that, when the parties finally met and Elliott saw by the deed that Sackett still insisted on his assuming the incumbrance, he concluded to do so. And, as we have before pointed out, although he professes not to recollect Sackett's instructions to him to have the incumbrance assumed, yet his statement of what was said, and his actions in drawing and attempting to have Elliott sign a contract directly assuming the incumbrance, show that he did in fact receive such instructions. In weighing his testimony, Hill's bias in favor of Elliott,

his employer, after if not before this trade, as well as his feeling against Sackett, who has been unable to pay him in full, must be borne in mind. (Printed Record, pp. 75 to 77.) It cannot be successfully contended that Hill was the general agent of Sackett, although Hill states that he represented Sackett in this trade, and in answer to the leading question "Did you in any way, shape or manner, "represent Mr. Elliott or receive any pay from him?" says "No, sir." (Printed Record, p. 73) Yet he afterwards states that he acted simply as a real estate broker in the matter. (Printed Record, p. 74.) As such he was the agent of both parties. Sackett was to pay the commission on the sale of his property, and presumably Elliott was to pay the commission on the sale of his. He had no written authority from Sackett, and there is no proof of any agency in his behalf, except to sell the property with an assumption of the incumbrance. He occupied the same relation to Elliott with regard to the Evanston and Iowa property which entered into this trade, that he did to Sackett with regard to the property in dispute. And this appears from Elliott's testimony, who says: "I supposed "Hill had written the deed, and I knew that he promised "to make the deed," clearly showing that Hill was acting for him. It should be observed further, that this statement of Elliott may mean that Elliott, knowing from first to last what Sackett's intention was, expected, through Hill, to get a deed so drawn as to release Elliott from liability. If this be so, then of course Elliott would have no standing at all in a court of equity. Having been a party to an attempt at fraud which he failed to consummate, he is entitled to no redress. Upon this consideration of all the testimony relating to a mistake in this matter, we seem to be justified in the position that the proof upon this point is so weak as to entitle it to no consideration whatever.

E.

THE DEED PROPERLY EXPRESSES THE LEGAL EFFECT OF THE CONTRACT.

We have assumed thus far, for the sake of the argument, that there is a difference between the deed sought to be reformed and the preliminary contract upon the point in question. And we have shown that even if this be so, the evidence of the deed is not overcome by that of the contract. But in fact the deed does properly express the legal effect of the contract, as we shall now proceed to show. The contract related to Illinois real estate; it was executed in Illinois, and must be construed by the decisions of the Supreme court of Illinois. These are as follows upon this point:

"Taking a deed subject to an outstanding mortgage "creates no personal liability on the grantee to pay off "the incumbrance, unless he has specially agreed to do "so, *or the amount of the mortgage has been deducted "from the purchase price.*"

Comstock v. *Hitt*, 37 Ill., 549.

"A clause reciting that a deed is made subject to a "mortgage, creates no personal liability, * * * *unless* "*amount of incumbrance has been deducted from the* "*purchase price.*"

Fowler v. *Fay*, 62 Ill., 377.

Sackett testifies that the price agreed upon for the property conveyed to him by Elliott was fifteen thousand dollars, and it was paid by the assuming of the mortgage, which was $9,000, by Elliott, and by four lots in Evanston,

conveyed to Sackett, and 120 acres of land in Iowa, conveyed to Sackett's wife, in consideration of her right of dower in the property conveyed to Elliott. (Printed Record, p. 45.)

Elliott testifies that according to the terms of the bargain, Sackett's property was called worth fifteen thousand dollars, and the incumbrance was nine thousand dollars, leaving the nominal net value six thousand, and the property he gave Sackett represented about six thousand dollars. (Printed Record, pp. 68 and 69.)

The preliminary contract states that Elliott covenants and agrees to pay Sackett fifteen thousand dollars, subject to an incumbrance of nine thousand dollars, and the consideration of Sackett's deed to him is fifteen thousand dollars. (Printed Record, pp. 5 and 6.)

It appears, therefore, from all the testimony, without contradiction, that the amount of the mortgage in this case was deducted from the purchase price. The purchaser, therefore, although by his contract he was to take the property "subject to" the incumbrance, became personally liable to pay off the incumbrance, and the deed correctly expresses the legal effect of the contract. There is no difference between them in this respect, and the decree complained of simply enforces the obligation which Elliott entered into both by the contract and the deed.

IV.

IF ELLIOTT MADE ANY MISTAKE IT WAS ONE OF LAW AND NOT OF FACT, FROM WAICH A COURT OF EQUITY WILL NOT RELIEVE HIM.

If, then, Elliott, after agreeing to deduct the amount of the incumbrance from the purchase price, supposed that he was released from personal liability for it by the use of the words "subject to," and if the deed represents no other agreement between the parties, still his mistake was one of law and not of fact, and from such a mistake a court of equity will not relieve him.

This court has said, in a similar case:

"Ought the court to grant the relief which is asked for "upon the ground of mistake, arising from any ignorance "of law? We hold the general rule to be that a mistake "of this character is not a ground for reforming a deed "founded on such mistake; and whatever exceptions there "may be to the rule, they are not only few in number, "but they will be found to have something peculiar in "their characters."

Hunt v. *Rousmaniere's Admrs.*, 1 Peters, 16.

In a subsequent case this court, citing the above decision, says "that mere mistakes of law are not remedi- "able is well established. * * Testing the case by "the principle 'that a mistake or ignorance of the law "forms no ground of relief from contracts fairly entered "into with a full knowledge of the facts,' and under cir- "cumstances repelling all presumptions of fraud, imposi- "tion or undue advantage having been taken of the party, "none of which are chargeable upon the appellants in

"this case, the question then is, were the complainants en-
"titled to relief? To which we respond decidedly in
"the negative."

Bank of the U. S. v. *Daniel*, 12 Peters, 56.

Of the same purport are the Illinois decisions. Where a bill was filed alleging that there was a mistake in a contract and praying a reformation thereof, the court says: "*If he misconstrued the contract as written*, that was a "mistake of law and not of fact, and for such mistakes "equity can grant no relief. It is where parties intended "to insert words in a contract which were by accident "omitted, that equity can reform the contract, by insert-"ing them or by expunging words they did not intend "to have inserted. *If the words are written as the par-"ties intended they should be written*, or supposed they were "written when they signed the contract, *no matter how "much they may be mistaken as to the meaning of those "words*, no relief can be granted either at law or in "equity. The construction of words is a matter of law. "The insertion of words is a matter of fact. It is for "mistakes of fact alone that contracts may be reformed."

Sibert v. *McAvoy*, 15 Ill., 169.

And in a later case the same court says: "It does not "appear from any part of the bill that the mistake oc-"curred in the use of the terms which the parties did not "intend to employ in expressing their contract. Nothing "of the kind. The terms used were deliberately and "knowingly used, and *if under a misapprehension of their "legal effect, there can be no relief, and no reformation of "the contract.*"

Fitch v. *Priest*, 46 Ill., 441.

And in a recent case in this court it is held that it will not "enlarge or depart from the general and salutary "rule, that a mere mistake of law, stripped of all other "circumstances, constitutes no ground for the reformation "of written contracts."

Snell v. *Insurance Co.*, 98 U. S., 92.

Now, certainly it cannot be pretended here that the contract, as distinguished from the deed, was not fairly entered into, nor that it was without a full knowledge of the facts. There is no claim, even, much less any proof, of fraud, imposition or undue advantage. Nothing of the kind can be chargeable upon the appellees. The appellant, after rejecting one contract which did not suit him had another drawn just as he wanted it, which he signed.

And we have shown that the deed simply expressed the legal effect of the contract. "If he misconstrued the "contract as written, that was a mistake of law and not "of fact, and for such mistakes equity can grant no relief." Upon this ground alone, therefore, without regard to all the rest of the case, the decree of the Circuit court can and should be maintained.

V.

EVEN WHERE THE MINDS OF THE PARTIES HAVE NEVER MET, COURTS OF EQUITY DO NOT INTERFERE WHERE THERE WAS GROSS NEGLIGENCE ON THE PART OF THE PLAINTIFF IN FALLING INTO THE ERROR, OR IN NOT SOONER CLAIMING REDRESS, WHICH IS THE CASE HERE.

Upon still another ground it can be shown that the appellant is not entitled to the redress he seeks, and there-

fore should not be allowed to interfere with the decree appealed from. Even admitting that the mistake was one of fact, and of so fundamental a character that the minds of the parties never met, still courts of equity do not interfere in such a case, where there was gross negligence in falling into the error or *laches*. The general rule is laid down in

Story's Eq. Jur., 11th Edit., p. 143, Sec. 138 *i*.

It is supported by the following decisions of this court:

In a cause in equity the object of which was to have an alleged mistake in a policy of insurance corrected and relief given thereon, the opinion reads:

"The policy was in the possession of the agent for the "plaintiffs, and ought to have been understood by him be- "fore it was executed; *he retained it in his possession for* "*several months before a mistake was alleged.* * * * "Under the circumstances of the case, a court of equity "cannot relieve against the mistake which has been com- "mitted."

Graves v. *Boston Marine Ins. Co.*, 2 Cranch., 444.

"Mistake, to be available in equity, must not have "arisen from negligence where the means of knowledge "were easily accessible. The party complaining must "have exercised at least the degree of diligence 'which "may be fairly expected from a reasonable person.' (Kerr "on Fraud and Mistake, 407)."

Grymes v. *Sanders*, 93 U. S., 61.

"Nor should relief be granted where the party seek- "ing it has unreasonably delayed application for redress."

Snell v. *Insurance Co.*, 98 U. S., 90.

In the present litigation the deed sought to be reformed was not in the possession of the appellant's agent simply, but in his own. It ought to have been understood by him before it was executed, and he retained it in his possession, not several months only, but for more than a year before a mistake was alleged. Elliott testifies that he got the deed from the recorder's office certainly by the middle of April, 1876, and it remained in his custody up to the time of beginning this suit, which was April 28, 1877. He never read it or looked at it until a short time before he brought this suit. He met Sackett repeatedly, but never called his attention to it. He discovered the mistake, which he claims to be in the deed, at his home in Des Moines, Iowa. He was writing up his papers, looking them over and filing them away. He looked over this deed and never was so surprised in his life as when he saw that clause. The effect on him was such that he came near fainting. (Printed Record, pages 70, 71 and 72.) It appears, then, that the alleged mistake was one which Elliott could and did discover for himself without the aid or advice of counsel, that he needed only to look at the deed to find it out, and when he did so, he recognized it so quickly and powerfully that he nearly fainted away. We have above noted that at the time he received the deed he looked at it, but did not read it through, and did not take time to read the lengthy description of the mortgage, but supposed Hill had drawn the deed, and knew that he promised to make the deed right. By his own showing he deliberately refrained from informing himself of the obligation he was incurring, and kept the means of information in his hands for more than a year before he found it out, when the most cursory investigation would have revealed it to him. We submit that a clearer case

of gross negligence and inexcusable *laches* was never made out. And for these reasons, also, the action of the Circuit court should be confirmed.

VI.

COURTS OF EQUITY DO NOT INTERFERE WHERE INTERVENING RIGHTS HAVE ACCRUED OR WHERE THE PARTIES CANNOT BE PLACED IN STATU QUO. BOTH OBJECTIONS EXIST IN THE PRESENT CASE, AND APPELLANT MAKES NO OFFER TO RESTORE MATTERS TO THEIR FORMER POSITION.

Again the relief claimed by appellant could not in any event be granted where intervening rights have accrued or the parties cannot be placed in statu quo.

Story's Eq. Jur., 11th Edit., p. 143, Sec. 138 *i.*

"A court of equity is always reluctant to rescind unless "the parties can be put back in statu quo. If this cannot "be done, it will give such relief only where the clearest "and strongest equity imperatively demands it."

Grymes v. *Sanders*, 93 U. S., 62.

A deed otherwise entitled to be corrected cannot be reformed against the intervening rights of others acquired in good faith.

New Orleans v. *Montgomery*, 95 U. S., 19.

Even if Elliott never did in fact agree to assume this debt, and if the bill were properly drawn for that purpose, his only remedy at best would be to seek to rescind the contract, as shown by the cases first above cited. But he cannot obtain this relief because intervening rights have accrued. The defendant Dickey has an equity of

which he cannot be deprived in this way. Elliott by professedly assuming the debt, has delayed Dickey's recourse to the property until its value has diminished, has suffered the taxes and penalties to accumulate, and it would be inequitable now to relieve Elliott from the liability. "The "general rule is that a decree reforming a mistake in a "deed can only be entered when the litigation is between "the original parties to the instrument."

Adams v. *Stevens*, 49 Maine, 362.

Furthermore, the parties cannot now be placed in statu quo. The Iowa land has been conveyed to Mrs. Sackett, and three of the Evanston lots to Chauncey B. Blair. (Printed Record, 45 and 46.) Elliott has got back from Sackett the only unincumbered land he conveyed to him, (page 45) and now seeks to avoid the original consideration of the conveyance. If he were willing to do equity, and otherwise he cannot have equity, he would offer to do what in him lies to place the parties in their former condition. But no such offer is found in his bill. His position is simply that after enjoying the revenues of Sackett's property, and suffering taxes and penalties to accumulate, after lessening the value of Dickey's security, he now seeks to be relieved from his obligations to each of them, without any sacrifice on his part or any compensation to them. A more inequitable case was never presented to any chancellor.

Upon each and all of the above grounds the decree below should be affirmed.

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